91-1614

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INDUSTRIAL RISK INSURERS,
Petitioner,

v.

COTTON BROTHERS BAKING COMPANY, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a Court of Appeals recall its mandate in the absence of some intervening development that would justify reopening a final judgment?

2. Did *sua sponte* modification of a final judgment, without opportunity to be heard and without explanation, take $4 million of property without due process of law?

3. Did the Court of Appeals so depart from the usual course of judicial proceedings as to merit the exercise of supervisory powers by this Court?

LIST OF PARTIES

Industrial Risk Insurers is a property insurance pool which provides underwriting, loss prevention and claims handling services to member companies. The member companies of IRI who are responsible on the policy in question are: Aetna Casualty and Surety Company, Hartford, CT; Aetna Insurance Company, Hartford, CT; American Casualty Company of Reading, Pennsylvania, Reading, PA; Commercial Union Insurance Company, Boston, MA; Connecticut Indemnity Co., Hartford, CT; Continental Casualty Company, Chicago, IL; Continental Insurance Company, Concord, NH; Federal Insurance Company, Short Hills, NJ; Fidelity and Casualty Company of New York, Concord, NH; Fireman's Fund Insurance Company, San Francisco, CA; Firemen's Insurance Company of Newark, New Jersey, Newark, NJ; General Accident Fire and Life Assurance Corporation, Ltd., Philadelphia, PA; Glen Falls Insurance Company, Wilmington, DE; Great American Insurance Company, Cincinnati, OH; Hanover Insurance Company, Manchester, NH; Hartford Fire Insurance Company, Hartford, CT; Home Insurance Company, Manchester, NH; Insurance Company of North America, Philadelphia, PA; Monarch Insurance Company of Ohio, Columbus, OH; National Fire Insurance Company of Hartford, Hartford, CT; National Surety Corporation, Chicago, IL; National Union Fire Insurance Company of Pittsburgh, Pa., Pittsburgh, PA; New Hampshire Insurance Company, Manchester, NH; Northbrook Property and Casualty Insurance Company, Northbrook, IL; Northern Insurance Co. of New York, New York, NY; Northwestern National Insurance Company of Milwaukee, Milwaukee, WI; Pacific Indemnity Company, Los Angeles, CA; Providence Washington Insurance Company, Providence, RI; Reliance Insurance Company, Philadelphia, PA; Royal Globe Insurance Company, Chicago, IL; St. Paul Fire and Marine Insurance Company, St. Paul, MN; State Farm Fire and Casualty

Co., Bloomington, IL; Sun Insurance Office Limited, New York, NY; Travelers Indemnity Company, Hartford, CT; United States Fidelity and Guaranty Company, Baltimore, MD; United States Fire Insurance Company, New York, NY; and Zurich Insurance Company, Chicago, IL.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Industrial Risk Insurers (IRI), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 6, 1992.

OPINIONS BELOW

The opinions of the Fifth Circuit are reported at 941 F.2d 380 (5th Cir. 1991) and 951 F.2d 54 (5th Cir. 1992) and are reprinted in the appendix, 1a-24a, 73a-78a. The order recalling the mandate is reprinted at 83a-84a. The decision of the United States District Court for the Western District of Louisiana is unreported and reproduced at 25a-72a.

JURISDICTION

Jurisdiction of the lower courts was founded on 28 U.S.C. § 1332. The judgment to be reviewed from was entered January 6, 1992 and this Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Fed. R. Civ. App. P. 40(a) reads in relevant part: "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

Fed. R. Civ. P. 60 reads in pertinent part:

> (a) Clerical mistakes in judgments . . . may be corrected by the court at any time. (b) On motion and on such terms as are just the court may relieve a party . . . from a final judgment . . . [when] (5) a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fifth Circuit Local Rule 41.2: "A mandate once issued shall not be recalled except to prevent injustice."

STATEMENT OF THE CASE

The relevant facts all occur after denial of petitions for rehearing by the Fifth Circuit. Thus, the issues are procedural only and literally without precedent.

The district court ruled that pre-trial payments to the insured need not be credited to the insurer. The Fifth Circuit then reversed, holding that failure to credit the payments would result in a $4 million double recovery by the insured. 941 F.2d at 385, 8a. Both parties filed petitions for rehearing, the insured's substantive, the insurer's pointing out technical mathematical errors. The

petitions were denied on October 10, 1991, although technical changes were made in the original opinion.[1] 81a-82a.

The parties then agreed upon the amount necessary to satisfy the judgment, and on November 1, 1991, IRI deposited that amount into the Registry of Court. The mandate issued on November 4. The case was over. The judgment was final. No case or controversy was pending in any court and no further pleading or motion was filed by any party.

But, on November 25, 1991, the Court *sua sponte* recalled its mandate "pending further consideration of this case by the court." 951 F.2d at 55, 74a. When counsel for the parties called the Clerk of the Court to ask for information, they were told to file no papers unless requested to do so. No request came. The only externally observable event was that from Monday, November 4, through Thursday, November 7, the trial judge, whose opinion had been reversed in part, sat by designation with the Fifth Circuit.

On January 6, 1992, the Fifth Circuit granted respondent's previously denied petition for rehearing. In a "Substituted Opinion on Rehearing," the Court reversed its previous unanimous conclusion that the payments made prior to trial had to be credited to IRI to prevent a double recovery.[2] IRI was neither asked nor allowed to respond to respondent's petition for rehearing. Instead of delaying the mandate, the January 6 opinion also ordered that

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[1] The case, both at trial and on appeal, involved a third party, Baker Perkins, Inc. (Baker Perkins), an industrial baking supplier, who contracted to install replacement equipment after the fire that caused the interruption to respondent's business. There were delays which the parties attributed to each other. At trial, respondent obtained a judgment against Baker Perkins which was affirmed in part and reversed in part on appeal. Petitions for rehearing were denied, along with the others on October 10, 1991.

[2] The judgment against Baker Perkins was unaffected as was a judgment for $324,735 against IRI on a separate fire loss policy.

"the mandate shall issue forthwith." 951 F.2d at 55, 74a. IRI unsuccessfully moved for stays of execution and recall of mandate.

REASONS FOR GRANTING THE WRIT

Petitioner's research discloses no prior case wherein a federal court has recalled a mandate and then granted a petition for rehearing that it had previously denied. *A fortiori*, there are no cases where that occurred without an opportunity to respond to the petition for rehearing as contemplated by Fed. R. Civ. App. P. 40(a).[3] Quite naturally, therefore, this has never been done before by a court that did not offer a single syllable in explanation. The Fifth Circuit rendered a single judgment that, by the Court's own terms, was correct September 13, correct October 10, final November 4, questionable November 25, and wrong January 6. Yet, the Court either could not or would not explain why.

There is always a first time and this was it which then becomes precedent for the second unless it is checked. The need to halt such behavior represents the compelling reason for exercise of this Court's supervisory powers to intervene. Something fundamentally wrong transpired and it casts a foreboding shadow on the appearance of fair and impartial justice in the federal courts.

I. THE DECISION CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

No prior case in *any* circuit has recalled a mandate and then granted a previously denied petition for rehearing. The case is both unprecedented and not within the contemplation of the law in any circuit. The Fifth Circuit stretched its inherent powers to the limits and then broke them.

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[3] "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

Although it is impossible to know, because the Fifth Circuit offered no explanation, presumably the spontaneous recall of mandate was based on the Court's belief that it may have erred and that the error may have created an injustice. That is not the law in any other circuit. There is *no* dissent from the proposition that a final judgment once issued remains final except in extraordinarily limited circumstances—and those circumstances specifically exclude change of mind by the judges. *See, e.g., Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965) ("If [the court] were in error . . . it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973) ("Alleged erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment not void when issued"); *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 715 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 1095 (1983) (citing Wright & Miller § 3938 at 284-85) ("a conviction that the court erred [is] ordinarily not alone sufficient grounds for recall of mandate after final judgment"). To repeat, petitioner's research discloses no prior case wherein a federal court has recalled a mandate and then granted a petition for rehearing that previously had been denied.

This is not to imply courts do not recall mandates for, of course, they do. Correcting clerical errors constitutes the prime reason for recall of mandate. Wright & Miller § 3938 at 283-84. There is also a burgeoning class of cases where the mandate is recalled[4] to provide equal justice for those similarly situated. This Court took the lead in *United States v. Ohio Power Co.*, 353 U.S. 98 (1957) and *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) and the circuits have followed—

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[4] Or its functional equivalent occurs.

all the while stating that this inherent power should be used sparingly.[5] *Bethlehem Steel*; *Tulare*.

These exercises of inherent power by the Courts of Appeals conform to the powers of the district courts to modify judgments under Fed. R. Civ. P. 60. Thus, they "fill in the interstices" of the rules, *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123, 2134 (1991), whereby a Court of Appeals has similar powers to recall a mandate as a district court has to modify a judgment.[6]

The Fifth Circuit, however, went far beyond what a district court could do under Fed. R. Civ. P. 60. Indeed, it is no exaggeration to state that had a Fed. R. Civ. P. 60 motion been filed with the district court after November 4, it would have been dismissed as frivolous. The instant case involves no clerical errors; nor is there a second or intervening case that argues for similar results. The September 13 opinion of the Fifth Circuit ruled on the merits that IRI's payments to respondent prior to trial should be credited to IRI in deter-

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[5] This has caused a protest about overuse by Wright & Miller who believe that the strong federal interest in the policies of repose is too often overcome by a desire to see similar results in similar cases even after one has become final. Wright & Miller § 3938 at 287.

[6] In *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (DC Cir. 1971), Judge Leventhal provides an "exhaustive and scholarly" analysis of recall of mandate decisions. Wright & Miller § 3938 at 288. The parallels between Judge Leventhal's examples and Fed. R. Civ. P. 60 are clear: (a) need to correct clerical errors—Fed. R. Civ. P. 60(a); (b) fraud on the court—Fed. R. Civ. P. 60(b)(3); (c) avoiding different results in different cases at the same time—Fed. R. Civ. P. 60(b)(5); (d) the need to revise unintended instructions to the trial court which would produce an unjust result—Fed. R. Civ. P. 60(b)(6), as well as a variant of Fed. R. Civ. P. 60(a); (e) a catchall "other" category based on reasons that would support an independent suit at the trial court—Fed. R. Civ. P. 60(b)(2)(4). The now growing category of cases where a mandate is recalled to make it conform to a subsequent decision of this Court finds its parallel in Fed. R. Civ. P. 60(b)(6). *See* Wright & Miller § 2864 at 223.

mining the amount of loss. Respondent then devoted nine and one-half pages of its petition for rehearing to arguing that the recovery of pre-trial payments would not constitute a prohibited double recovery.[7] This position was rejected in the denial of rehearing on October 10 and issuance of mandate on November 4. It is then adopted in the "revised and corrected" opinion of January 6, two months after the case or controversy had ended at the Fifth Circuit. The Court changed its mind!

To second-guess is human. To undo a presumed error during the appropriate period is laudable. But, at some point, there must be an end to litigation (and jurisdiction) in a court, and if it is not at issuance of mandate, just where and when is it? When a mandate issues, everything changes and an appellate court may only act again under extraordinary circumstances paralleling those listed in Fed. R. Civ. P. 60. To go farther is to go against the law of all circuits and to claim an inherent power broader than the federal rules contemplate.[8] Because inherent powers are necessary to protect "the integrity of the court," *NASCO*, 111 S.Ct. at 2132, they must be used consistently with the integrity of process. The Fifth Circuit failed this in two ways: (1) by ignoring Congress' mandates in the federal rules and (2) by its failure to explain its actions. The result was a $4 million taking of petitioner's property without due process of law.

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[7] To the extent that the petition for rehearing simply reargued the original case, it did not conform to the Fifth Circuit's Internal Operating Procedure under Fed. R. Civ. App. P. Rule 40 which provides that a petition for rehearing "is not to be used for reargument of the issues previously presented . . . ." To the extent it did present a new argument, failure to allow a response is a blatant denial of the fundamental right to be heard. *See* Part B *infra*.

[8] For private civil litigation. Finality is less of an issue in institutional litigation. *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 759 (1992).

Had the Court seen fit to explain its actions, the conflict with the other circuits would be out in the open. Presumably, the Court would have stated it concluded it had erred and the error resulted in a presumed injustice, thereby constituting the extraordinary circumstances necessary for recall of mandate. Yet, no other circuit finds extraordinary circumstances flowing from the fact of its own supposed error. To repeat ourselves, no court has ever recalled its mandate to grant a previously denied petition for rehearing and respondent will be able to offer none in its opposition. As Wright & Miller state, "it should be apparent that the power to recall a mandate should not be used to destroy finality and repose simply on the ground that the court of appeals wrongly decided the case." § 3938 at 284-85. The Fifth Circuit ought not be able to elude its rejection of the law everywhere else by the expedient of not explaining its actions. To allow its unexplained judgment to stand would validate the departure from the accepted norms of judicial behavior.

II. THE DECISION RADICALLY DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The twin pillars of due process of law are procedural regularity and the right to be heard. Fed. R. Civ. App. P. 40(a) embodies the latter. Its injunction that "[n]o answer to a petition for rehearing will be received unless requested by the court . . ." recognizes that most petitions for rehearing will be routinely denied. 16 C. Wright, A. Miller & E. Gressman, Federal Practice and Procedure § 3986 at 473 (1977) (hereinafter Wright & Miller). Thus, the Advisory Committee on Appellate Rules explained, this provision was "included to save time and expense to the party victorious on appeal." Fed. Civ. Jud. P. & Rules 424 (West 1991 rev. ed.).

The changed circumstances flowing from deciding a case and writing an opinion transform the court from

neutral arbiter into the prevailing party's first line of defense. When something in a petition for rehearing shakes that defense, then Fed. R. Civ. App. P. 40(a) notes "a petition for rehearing will ordinarily not be granted in the absence of" a request for a response. The prevailing party's basic rights are at issue and counsel for that party, who will have a better comprehension of the entire record, may be able to cast serious doubt on the propriety of granting the petition. Thus, Wright & Miller state that "[i]f the court finds any merit in the petition, the court *will direct* its clerk to request that the prevailing party file an answer." § 3986 at 473 (emphasis added).

The plain meaning of "ordinarily" in the rule is that it will be the extraordinary case when a petition is granted without a response. Such cases do occur, for instance, a directly controlling intervening decision of this Court. *United States v. Allegheny-Ludlum Industries, Inc.*, 568 F.2d 1073, 1074 (5th Cir. 1978). But there was no intervening decision here; indeed, there are no visible extraordinary circumstances except the Court's own flip-flop which occurs without explanation.

The lack of explanation is telling: (1) The Fifth Circuit did not explain why it did not call for a response; (2) The Fifth Circuit did not explain why it recalled the mandate *sua sponte* (it did not even cite its own rule);[9] (3) The Fifth Circuit did not explain how it spontaneously came to believe that an error had been made; (4) and, finally, the Fifth Circuit did not explain why it changed its mind on the merits.

Every lawsuit has its loser and counsel must explain why the loss occurred. Invariably, the underlying message is that the loss occurred consistent with notions of due process: "We had our day in court; we were heard;

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[9] Fifth Circuit Local Rule 41.2: "A mandate once issued shall not be recalled except to prevent injustice."

we gave it our best shot, but could not persuade the court." Counsel for petitioner cannot say that. When the Fifth Circuit chased down its own final judgment, petitioner was not heard and, therefore, had no day in court.

What explanation can be given? The Fifth Circuit gave none. Its silence is broken only by external circumstances: the district judge sitting by designation between the issuance and subsequent recall of the mandate and the continuing serious claims within the same circuit over *ex parte* contacts and outside influences in the court ordered redistricting plan for the Texas Senate.[10] These are not such as to give confidence especially to someone who has watched a case go from final and won, to under consideration, to final and lost, by a procedure that is wholly unprecedented. One can imagine that there might be *some* legitimate explanation but one cannot imagine *what* such an explanation might be. One can only imagine explanations such as improper contacts and information to which IRI was not allowed to respond.[11]

The departures from procedural regularity are significant, blatant and unexplained. They fly in the face of "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" *Levine v.*

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[10] New York Times, February 17, 1992 at A11; February 14, 1992 at A19; January 26, 1992 at A14; Texas Lawyer, February 17, 1992 at 1, 30.

[11] Petitioner is not accusing the district judge or any other judge of any impropriety. Petitioner does not know if the district judge ever talked with any member of the Fifth Circuit panel, and even if he did, there is no way, at this time, to determine if such a discussion was proper or improper. The problem, in the circumstances of the instant case, is that the Court never offered an explanation for its remarkable conduct nor is any explanation readily apparent. It is essential to public confidence in the fairness and impartiality of the judicial system that the appearance of injustice never intrude into decision making. The safest way to avoid an impression of unfairness is to adhere to procedural regularity.

United States, 362 U.S. 610, 616 (1960) (quoting *Offut v. United States*, 348 U.S. 11, 14 (1954); *see also Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 812, 825 (1986) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The unexplained departures send the message that the rule of law is binding on all but federal judges. Had the Fifth Circuit been an administrative agency, its actions reversing itself without explanation would be labeled arbitrary and capricious and reversed. *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 56 (1983) ("while the agency is entitled to change its view . . . it is obligated to explain its reasons for doing so").

Procedural regularity, the need to follow the rules in all cases, is not a mere nicety. It represents due process and, thus, ultimately maintains the integrity of law. "[I]t is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971). No litigant, no matter how great or how small, should be exposed to the whims of federal judges who ignore the rules either because the rules are inconvenient or because, in the rush to judgment, the judges lack the time to read appellate rules and hear argument on both sides.

CONCLUSION

The instant case stands nakedly alone. Each of the Fifth Circuit's departures from the norm—its *sua sponte* recall of the first mandate, its failure to allow petitioner to respond to the revived petition for rehearing, its failure to cite or discuss the federal rules, its rush issuance of the second mandate—reflects badly on the fair administration of justice within the circuit. Redress for these procedural improprieties rests in this Court's "supervisory powers over federal courts . . . to protect the integrity of the federal system." *Frazier v. Heebe*, 482 U.S. 641, 648 n. 7 (1987).

It may be that from this Petition and the Response that no further briefing of the case would add to the clarity of a dispositive legal issue. Thus, the case may be an appropriate vehicle for summary reversal. But, in any event, petitioner respectfully submits that grant of the Petition for Certiorari is appropriate and necessary to rectify a proceeding that crossed the line separating legal error from lawless behavior.

Respectfully submitted,

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Dated this 6th day of April, 1992.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-4128

COTTON BROTHERS BAKING COMPANY, INC.,
Plaintiff-Appellee,

v.

INDUSTRIAL RISK INSURERS,
Defendant-Third-Party Plaintiff-Appellant,

v.

BAKER PERKINS FOOD MACHINERY, INC.,
Third-Party Defendant-Appellant.

COTTON BROTHERS BAKING COMPANY, INC.,
Plaintiff-Appellee,

v.

BAKER PERKINS, INC.,
Defendant-Appellant.

BAKER PERKINS, INC.,
Plaintiff-Appellant,

v.

COTTON BROTHERS BAKING COMPANY, INC.,
Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Louisiana

Sept. 13, 1991

Before POLITZ, WILLIAMS, and JONES, Circuit Judges.

POLITZ, Circuit Judge:

This appeal poses complex damages and liability issues resulting from a fire at Cotton Brothers Baking Co., Inc., a bakery in Alexandria, Louisiana, on Friday, February 13, 1981. Multiple suits resulted. The matters were tried in part by a jury and in part by the bench and the ultimate judgments are now before us on appeal. For the reasons assigned we modify those judgments and, as modified, affirm.

Background

At the time it was severely damaged by fire, Cotton Brothers Baking Co., Inc., was one of eight subsidiaries of Cotton Bros., Inc. Each subsidiary was independently incorporated and occupied a single location, but the companies operated as a single integrated enterprise in the commercial baking industry. Gene Cotton served as president and CEO of the parent company and of each subsidiary, and the membership of the boards of directors of each company was identical.

The damage to the Alexandria bakery was substantial and its effect was felt throughout the Cotton Bros. organization. In order to minimize the impact on production as a whole, Cotton Bros. shifted some of the prior Alexandria production to other facilities and purchased products from competitors for resale under the Cotton label.

Cotton Bros. contacted Baker Perkins, Inc., a Michigan industrial baking supplier, about replacement of the two principal pieces of equipment destroyed in the fire, an oven and a rack proofer. After substantial negotiations and site surveys, Baker Perkins contracted with Cotton Bros. Baking Co., Inc. to install the equipment. The initial submission was an offer by Baker Perkins dated February 20, 1981, and included an accelerated installation price of $1,354,820. Another proposal, which did not have a $165,575 acceleration premium or a $159,160 replacement cost differential, contemplated a "start-up" date eight months later than that specified in the final agreement.[1] The initial offer included the following details:

SHIPPING AND INSTALLATION
SCHEDULE ACCELERATED
INSTALLATION

Order Placement	2-22-81
Shipment	5- 1-81
Start Erection	6-12-81
Final Shipment	6-26-81
start-up [sic]	9-21-81

Schedule predicated on order placement by February 22, 1981. Any delay in order placement beyond that date will directly effect [sic] final dates of shipment, erection and final start-up beyond those listed above.

Despite the timing calling for order placement by February 22, the proposal was accepted verbally by Cotton Bros. on March 6, 1981, followed by a signing on March 19. This final submission constituted a counter-proposal which Baker Perkins approved and accepted on May 14, 1981. Start-up actually occurred in the late spring of 1982.

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[1] Some equipment was replaced rather than repaired. "Start-up" refers to resumption of baking production.

Cotton Bros. also filed a claim with its insurer, Industrial Risk Insurers (IRI), under policies protecting against both fire property damage to equipment and business interruption. Significantly, the policies did not list Cotton Bros., Inc. as an insured but, instead, named three of the subsidiaries and five separate premises. The business interruption policy provided in pertinent part:

SECTION I

A. Recovery in the event of loss hereunder shall be the ACTUAL LOSS SUSTAINED by the Insured resulting directly from such interruption of business, but not exceeding the reduction in gross earnings less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such described property as has been damaged or destroyed, commencing with the date of such damage or destruction and not limited by the date of expiration of this Policy. Due consideration shall be given to the continuation of normal charges and expenses, including payroll expense, to the extent necessary to resume operations of the Insured with the same quality of service which existed immediately preceding the loss.

SECTION III

A. EXPENSES RELATED TO REDUCING LOSS. —This Policy Also covers:

1. such expenses as are necessarily incurred for the purpose of reducing loss under this Policy (except expense incurred to extinguish a fire), and

2. such expenses, in excess of normal, as would necessarily be incurred in replacing any finished

> stock used by the Insured to reduce loss under this Policy, but in no event shall the aggregate of such expenses exceed the amount by which the loss otherwise payable under this Policy is hereby reduced.

IRI, which was involved in the Cotton Bros. decision to accept the accelerated Baker Perkins contract, hired a team of accountants to audit the records of Cotton Bros. and to adjust claims arising from the interruption of business policy. Cotton Bros. also assembled a group for the same purpose, composed of in-house personnel and accountants from its retained accounting firm, Ernst & Whinney. By their own admission, neither the Ernst & Whinney personnel nor the Cotton Bros. in-house staff had any experience with interruption of business insurance claims. They relied on the expertise—and good faith —of IRI's accountants to accurately calculate those losses.

The Cotton Bros. team submitted a document to the IRI team entitled "Methodology for Computing the Cost of Business Interruption," which the district court found contained patent errors in application of business interruption insurance. IRI accepted the document without comment and made no effort to assist Cotton Bros. in correcting errors.[2] Additionally, IRI insisted that as Cotton Bros., Inc. was not a named insured, only the damages directly related to Cotton Bros. Baking Co. (the Alexandria bakery entity), could be used to calculate losses.

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[2] The methodology involved a line-item reimbursement by IRI for identifiable extra costs that were incurred as a result of the business interruption. The district court found this approach operated as nothing more than an extra expense policy, "a form of insurance coverage to reimburse the insured for specific items of extra expense over and above the normal expense which the insured incurred. . . ." The district court further found that as early as 1970 both IRI and Cotton Bros. intended that a full and complete business interruption policy be confected, rather than an extra expense policy.

IRI's payments to Cotton Bros. under the business interruption policy eventually totaled $3,585,761.97.

Once Cotton Bros., with IRI support, approved the accelerated purchase agreement with Baker Perkins to replace destroyed equipment, IRI substantially changed its position with respect to the amount it owed Cotton Bros., and, further, the insurance policy under which that amount was to be paid. Initially approved as a fire insurance recovery, the payment was then changed, minus the acceleration premium, into a business interruption recovery, for which IRI stood to benefit because it could take a credit against Cotton's gross earnings loss. Eventually IRI paid the lower estimate and purported to advance the remaining acceleration as an expediting expense, repayable if Baker Perkins failed to perform timely its accelerated schedule.

Several lawsuits resulted. Cotton Bros. Baking Co. sued Baker Perkins in the Western District of Louisiana for damages arising from the latter's delay in completing the installation of the oven and proofer. Baker Perkins counterclaimed for the $209,000 unpaid balance on the original contract, and other ancillary equipment installation contracts. Baker Perkins also filed an action in the Eastern District of Michigan against Cotton Bros. for an amount and under causes of action identical to its counterclaim in the parallel action. That case was transferred to the Western District of Louisiana, where Cotton Bros. counterclaimed, asserting the same claims as Cotton Bros. Baking Co. in the original action. Baker Perkins moved, *inter alia*, to dismiss all claims for damages asserted by Cotton Bros. given that the insurance contract named Cotton Bros. Baking Co. The district court promptly denied that motion, which came after three and one-half years of litigation in which Cotton Bros. had admitted Baker Perkin's allegation that the two parties had entered into a valid contract. The district court did, however, dismiss Cotton Bros. Baking Co.'s claims against Baker

Perkins. A jury determined that Baker Perkins had breached the contract, that Cotton Bros. had sustained $2,065,575 in damages resulting from the breach, and that Cotton Bros. was 35% responsible for the breach. Accordingly, the district court awarded Cotton Bros. $1,342,624 plus legal interest from the date of judicial demand in the Baker Perkins case. The district court directed a verdict in Cotton Bros.' favor in Baker Perkins' suit for $209,000.

In an action consolidated with the Baker Perkins suit, Cotton Bros. Baking Co. and Cotton Bros. brought suit in the Western District of Louisiana against IRI claiming damages under the business interruption policy. After a bench trial involving substantial taking of evidence, the trial court reformed the original insurance policy to make and include Cotton Bros., Inc., as a named insured at all relevant times, entered judgment in favor of Cotton Bros. Baking Co. and Cotton Bros. for the $324,735 "advanced" by IRI in the accelerated contract dispute, and awarded state law insurer-delay penalties, attorney's fees, and prejudgment interest. Additionally, the court awarded Cotton Bros. $4,498,000 in damages [3] plus penalties, attorney's fees and prejudgment interest less $427,460.67 credit to be equitably applied upon payment of IRI's judicial obligation to Cotton Bros. The credit was applied by the court based on an acceptance by Cotton Bros. that the amount ought not be clasified as earnings damages. Finally, the district court ordered IRI subrogated to

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[3] Cotton Bros. introduced evidence indicating its actual earnings were a loss of $2,535,000 and its projected earnings were $3,361,000, resulting in a reduction of gross earnings of $5,896,000. These projections were based on a business interruption period running from February 13, 1981 through September 25, 1982. The trial court, however, determined that the business interruption period terminated on May 8, 1982, when the replacement oven and proofer went into operation. The court, accordingly, adjusted the $5,896,000 figure to $4,498,000, based on proportionately reduced actual earnings of negative $1,933,926 and projected earnings of $2,564,073.

the Cotton Bros. recovery in the Baker Perkins action, contingent upon IRI's payment of all other obligations resolved in that litigation.

Dissastisfaction abounded. Baker Perkins and IRI timely appealed.

Analysis

Before us are appeals, as noted, from both a bench trial and a jury trial. At the bench trial, the district court construed an unambigous contract and awarded damages based on calculations related to that contract. Such construction presents a question of law for which our review is *de novo*. *Southern Natural Gas Co. v. Pursue Energy*, 781 F.2d 1079 (5th Cir. 1986).

The IRI Litigation

IRI raises three issues on appeal. First, it asserts that the trial court erred by not crediting the $3,585,761.97 which IRI had already paid under the business interruption policy against the $4,498,000 judgment awarded below. The judgment was for claims under section IA of the business interruption policy designed to compensate Cotton Bros. for the actual loss incurred as a result of the fire. The district court had found that the $3,858,761.97 paid by IRI under the line-item methodology ought not be treated as payments for Cotton Bros.' actual loss sustained because the line-item approach was not fueled by any measure of earnings. The court thus treated the amount as costs incurred in mitigation of the net loss caused by the fire, payable under sections IIIA of the policy.

In this the trial court erred. Failure to credit IRI for its prior payments would result in a double recovery by Cotton Bros. The Louisiana courts have underscored the importance of applying business interruption insurance in a manner which avoids double recovery.

> We hold that the business interruption clause in the policy in this case is unambiguous. The language

> of the policy sets forth the formula for calculating the amount of actual loss by an insured when business is interrupted, and allows the business to remain in the same financial condition as before the loss. Although the policy is designed to protect the insured, it is also designed to prevent the insured from being placed in a *better* position than if no loss or interruption of business had occurred.

United Land Investors, Inc. v. Northern Ins. Co., 476 So.2d 432, 436 (La.App.1985) (emphasis original). While the methodology used did not reflect accurately the lost earnings experienced by Cotton Bros., the payments nonetheless represented compensation for lost earnings. The $4,498,000 calculated by the trial court as the actual loss Cotton Bros. sustained includes the difference between projected earnings had there not been a fire $2,564,073), and actual earnings during the period of business interruption (a loss of $1,933,926). The loss figure did not include the $3,585,761.97; if it did, then actual earnings during the interruption period would be (positive) $1,651,835.97, and the reduction in gross earnings (projected minus actual) only $912,238.03.

The court would have been correct in excluding the $3,585,761.97 had an equal amount been excluded from the actual loss figure based on expenses incurred by Cotton Bros. Simply stated, if these line-item expenses were not included in the actual earnings figure, then Cotton Bros. lost $1,933,926 during the business interruption period. However, review of the record discloses no such exclusion from actual losses. Accordingly, the Cotton Bros. judgment against IRI for claims under section IA of the business interruption policy is modified to $912,238.03.

The Accelerated Premium

IRI next contends that the trial court erred by awarding Cotton Bros. the $324,735 which IRI deducted from payments to Cotton Bros. for having replaced rather

than repaired its oven and proofer, and for having done so at an accelerated schedule.[4] We disagree. The facts attendant to the March 6, 1981 acceptance by Cotton of IRI's draft of a proof of loss reflected IRI's willingness to pay $1,188,425 under the fire policy, and $165,575 under the business interruption policy.[5] The fire policy figure included the $159,160 replacement cost of the oven and proofer.

Immediately after the meeting, Cotton Bros. verbally accepted the Baker Perkins proposal discussed at the March 6 meeting. We perceive no error in the district court's recounting of the subsequent facts:

> Cotton was committed. IRI then refused payment. Now Cotton was compromised. Cotton had exercised extraordinary diligence in its efforts to rebuild and restore in the shortest time as possible to the evident benefit of both IRI and itself. It had been successful in securing the contractor most capable of doing a competent job in the shortest time possible. It had settled its claim against IRI for the loss of the proofer and the oven for a sum proposed by IRI's own agent. IRI now refused to pay. Incredible!

The trial court then determined that IRI's decision to deny the coverage—and later to recast a partial payment as an "advance" on the chance of Baker Perkins' timely completion of the work—was a strong-arm attempt to

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[4] The amount represents the cost differential of replacement rather than repair, $159,160, plus the acceleration premium, $165,575. Cotton Bros. does not quibble with the deduction of another $182,655, representing the cost of a cascade apparatus, equipment used to load the proofer.

[5] *See* Notes from Insurance Meeting 6, March 6, 1981. Exhibit 122A. "Tom Simpson advised that Mr. Bud Jarratt had gotten with the IRI and they prepared another partial settlement of the claim. They have agreed to pay $531,200 on the proofer and $658,045 on the oven which totals $1,189,245."

deny the existence of an enforceable agreement. With respect to the $159,160 cost differential, the trial court properly, therefore, held IRI to the agreement it had forged on March 6, 1981, by awarding judgment in favor of Cotton Bros.

The acceleration premium, which the district court apparently erroneously lumped in with the fire insurance policy, should have been treated as an expediting expense, given its mitigating effect on Cotton Bros.' losses. The contractually-mandated test is not, as IRI suggests, whether the accelerated schedule was met by Baker Perkins, but, instead, whether the expense was one "necessarily incurred for the purpose of reducing loss under [the business interruption] Policy."[6] The district court found that the Cotton Bros. contract with Baker Perkins under the accelerated scheduling plan was just such an expense. IRI points to no contrary evidence. The trial court did not err.[7]

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[6] *Cf.* R. Morrison, A. Miller & S. Paris, *Business Interruption Insurance: Its Theory and Practice* 103 (1986) (emphasis original):

> It should also be noted that, in the application of the expediting expense provision, a different timing approach may be taken than in the case of the basic business interruption loss. In the case of expediting expense, hindsight must be used because only *after the fact* is it possible to determine whether or not there was an actual savings and how much it is. This should create no problem because the two compensation provisions have entirely different purposes and each stands on its own feet.

[7] IRI's contention that Cotton Bros.' award of the $324,735 constitutes unjust enrichment is without merit. IRI argues that it advanced Cotton Bros. the funds in order to pay Baker Perkins, but that Cotton Bros. has not paid the money over to Baker Perkins. Cotton Bros. could only be unjustly enriched in the first instance to the extent that it received a judgment beyond the amount which it owes or has paid Baker Perkins. Baker Perkins and Cotton Bros. stipulate that of the $209,000 owing to Baker Perkins, only a portion relates to expediting expenses, *i.e.*, the

Statutory Penalties

In its final enumeration of error,, IRI challenges the district court's assessment of a 12% statutory penalty on monies awarded to Cotton Bros. under the IRI policies. IRI contends that the district court misapplied the applicable state statute, La.R.S. § 22:658, which subjects insurers found "arbitrary, capricious, or [acting] without probable cause" to a 12% penalty plus reasonable attorney's fees, upon failure to make payment within 60 days of receipt of proof of loss.[8] Proof of loss is defined as that point in time when the insurer had adequate knowledge of the loss. *Hart v. Allstate Ins. Co.*, 437 So.2d 823 (La.1983). The district court's assessment of penalties was based on its finding that IRI effected a "stonewalling" strategy in every aspect of its dealings with Cotton Bros. The strategy began with a continuing—and unjustified, in light of its longstanding relationship with Cotton Bros.—contention that only the accounts of the Alexandria bakery, and not Cotton Bros. *in toto*, were applicable to the business interruption loss calculations. IRI also provided little, and at times incorrect, advice to its insured on the correct methodology for calculation of business losses. The district court found that IRI's instruction to its accounting team "was intended to induce error by Cotton. The instruction was made for the illicit purpose of inhibiting and defeating Cotton's right to file any claim for earnings damages under Section IA and IIA of the policy. The stonewall position of IRI was arbitrary, capricious, in bad faith and without probable cause." Simultaneously, the dispute regarding the Baker Perkins replacement contract was simmering, in a situation described *supra*, for which the district court specifically imputed to IRI an attempt to strong-arm its insured into an unfavorable bargaining position.

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acceleration premium. Our holding with respect to the companion Baker Perkins litigation disposes of the funds in question, leaving no party unjustly enriched.

[8] Since amended to require payment within 30 days.

The characterization of an insurer's failure or refusal to pay is a question of fact, *Smith v. State Farm Fire & Cas. Co.*, 695 F.2d 202 (5th Cir.1983), and propriety of assessment of insurer penalties is likewise, "in part a factual determination," *United Land Investors*, 476 So.2d at 438. IRI's arguments leave us unpersuaded that the district court, sitting as the trier of fact, was clearly erroneous in its factual findings.

The court did err, however, in assessing statutory penalties on the entire $4,498,000 which it awarded Cotton Bros. on the business interruption policy, as well as the $324,735 awarded on the fire policy. In the first instance, having modified the former judgment to $912,238.03, we would affirm the assessment of penalties only as applied to that amount; however, the trial court committed further error by assessing penalties on amounts already advanced by IRI to its insured. IRI's contention that the district court erroneously attached a statutory penalty on a portion of the funds which the court ordered "equitably credited" to IRI upon payment of all sums awarded at bar, is well taken. That amount, $427,460.67, was advanced to Baker Perkins; IRI cannot now be held to pay a penalty for not having advanced that sum of money. This would have the effect of compensating Cotton Bros. for the loss of the use of funds of which it, in fact, *had* use. We therefore modify the district court's award of statutory penalties to reflect a 12% penalty on the $484,877.36 difference between the judgment and the credit.

Having affirmed the $324,735 in whole, however, we affirm the penalties with respect to that additional amount.

The Baker Perkins Litigation

In the companion action also, before the court, Baker Perkins first argues that the district court erred by holding that Cotton Bros., rather than Cotton Bros. Baking Co., was permitted to recover for breach of the re-

placement contract. Baker Perkins correctly advances the notion that under Louisiana law a corporation is not permitted to bring a cause of action on behalf of a wholly-owned subsidiary corporation, *Eximco, Inc. v. Trane Co.*, 737 F.2d 505 (5th Cir.1984), and that there must be privity of contract for recovery for a breach. *Impressive Builders, Inc. v. Ready Mix, Inc.*, 535 So.2d 1344 (La. App. 1988). The trial court did not, however, entertain an impermissible lawsuit; instead, it properly concluded that Cotton Bros. rather than Cotton Bros. Baking Co. was the proper party to the contract. This was within the equitable powers of the district court. As the Louisiana Court of Appeal informs:

> "In interpreting contractual provisions about which there exists some doubt, a court must seek the true intention of the parties, even, if to do so necessitates a departure from the literal meaning of the agreement." In such cases, the law is never so inflexible as to bind parties to a contract which neither intended.
>
> . . . The established method of resolving a mutual mistake in a contract is reformation of the agreement to reflect the true intent of the parties.

Placid Refining Co. v. Privette, 523 So.2d 865, 868 (citations omitted), *vacated on rehearing on other grounds*, 523 So.2d 870 (La.App.1988).

The district court's action, which came in response to a motion by Baker Perkins to amend was appropriate in the instant case, given the underlying procedural posture of the case. The original suit was, in fact, Cotton Bros. Baking Co.'s action against Baker Perkins, an action brought in the Western District of Louisiana. Four days later, Baker Perkins brought its suit against Cotton Bros., Inc., alleging *inter alia*, a contract with the parent company and seeking recovery for the unpaid balance of the contract price.

The district court interpreted Baker Perkins' motion to amend as an eleventh-hour ploy to defeat the Cotton Bros. counterclaim (filed as a Rule 13(a) compulsory counterclaim) by disclaiming the existence of a contract it had spent three and one-half years urging in litigation. In light of Baker Perkins' longstanding business relationship with Cotton Bros., its acceptance of earlier payments for the contract from Cotton Bros. (not Cotton Bros. Baking Co.), its frequent correspondence with Cotton Bros. during the negotiations for the contract, and Baker Perkins' over-three-year delay in seeking leave to amend its complaint to change the name of the defendant, the court acted within its discretion in holding Baker Perkins to the facts it had alleged and which its defendant, Cotton Bros., candidly and appropriately had admitted. Our holding in *Hall v. Aetna Casualty and Surety Co.*, 617 F.2d 1108 (5th Cir.1980), presents an analogous situation. There, we held that the district court did not abuse its discretion in disallowing an insurer to substantially amend its answer, mid-trial, from a position of admitting coverage under an insurance policy to one excluding coverage under a previously "overlooked" provision. "The trial judge recognized, however, that this final amendment would clearly prejudice the opposing party and simply came too late." *Id.* at 1110-11. A similar finding obtains in the instant case. As Judge Scott incisively wrote:

> In the case at bar, the plaintiff, Baker Perkins, brought suit, alleging a contract with the defendant parent corporation and sought recovery of funds due under the contract. Cotton Bros., Inc. admitted the allegation and pleaded its counter-claim which was compulsory under Rule 13(a) of the Federal Rules of Civil Procedure. The parties labored under these facts for three and a half years before Baker Perkins moved to amend its complaint to correct "a mistake" made by its Michigan counsel when naming the defendant/contracting party.

> We are of the opinion that Baker Perkins was well aware of who it was suing and why it was doing so.

Cotton Bros.' good faith reliance on the veracity of Baker Perkins' pleadings was well-founded; there was ample evidence that Cotton Bros. was indeed the proper party in this case.[9] We perceive no abuse of discretion in this instance.

The Limitation of Liability Provision

Baker Perkins next maintains that the trial court misconstrued a limitation of liability provision in the oven and proofer contract. The provision declares:

> WARRANTY
>
> Seller warrants the apparatus to be as specified herein; and will correct any defects in the apparatus which develop under normal and proper use and maintenance within twelve months after erection (defective parts to be replaced F.O.B. factory), provided Buyer shall have given prompt notice to Seller of any such defects. The foregoing warranties are EXPRESSLY IN LIEU OF ALL WARRANTIES

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[9] *McKnight v. Blanchard*, 667 F.2d 477 (5th Cir.1982), cited by Baker Perkins, is inapposite. In that inmate's civil rights action an order was entered substituting the current sheriff for his predecessor, "but retaining as party the predecessor sheriff originally sued." The inmate complained only of a clerical change in the caption of the case, "apparently fearing that the 'et al.' does not include the 'Lubbock County Jail.'" We deemed his contention meritless, holding "The administrative captioning of the suit obviously has no effect on what cause of action and what parties are (or are not) joined in the substantive allegations of the pleadings." *Id.* at 482. In the instant case, Baker Perkins is *not* being held to its original pleadings merely on the basis of the caption given the case. Instead, its three-plus years litigation with the facts it alleged, and which Cotton Bros. *admitted* and *relied upon* are the operative concerns of the court.

> WHATSOVER, EXPRESSED, IMPLIED AND STATUTORY, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS. Seller will in no event be liable to Buyer or others for any direct, indirect, special or consequential damages or loss of production or loss of profits resulting from any cause whatsoever, including but not limited to defective workmanship or materials or any delay, act, error or omission of Seller. Seller shall be notified of, and reserve the right to be present at, any test which Buyer may make in relation to operation. All equipment manufactured by others, but included as part of this contract, will be subject to standard warranty as issued by this manufacturer.

The district court held that this disclaimer was effective only with respect to redhibitory vices, and not for the purpose urged by Baker Perkins, *i.e.*, exclusion of claims for lost profits flowing from delay in performance of the contract. We agree. Baker Perkins reurges and underscores its contention that the presence of the three words "or any delay" in the warranty section of the contract essentially forecloses discussion on this point. We disagree. The Louisiana Court of Appeal has concisely stated the fundamental rules of contract construction prevalent in Louisiana:

> The interpretation of a contract begins with the document itself. . . . La.C.C. Art. 2046 states that when the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the intent of the parties. If a court does attempt to discern the intent of the parties, the contract must be interpreted in light of other provisions so that each is given the meaning suggested by the contract as a whole.

Grant v. Ouachita Nat'l Bank, 536 So.2d 647, 651 (La. App.1988) (citing La.C.C. arts. 2045-57). The district

court correctly identified the warranty paragraph as one pertaining only to defects in the items being sold. Clearly and unambigously the paragraph begins with the words, "Seller warrants the apparatus to be as specified herein. . . ." Delivery, which the district court held was the portion of the contract applicable to Baker Perkins' delay, has a separate paragraph in the contract.[10] Significantly, the delivery paragraph provides a limited variety of situations for which Baker Perkins' delay in delivery would be excused, none of which pertain to the instant case. Logically, then, Baker Perkins may be held liable for those delays in delivery not caused by the enumerated excused conditions. Under Baker Perkins' strained interpretation of the offer it tendered to Cotton Bros., no liability whatsoever would accrue from even indefinite delay in delivery, notwithstanding lack of contract-specified justification. Such a reading fails to give meaning to the delivery provision of the contract, as well as to the premium which Baker Perkins charged Cotton Bros. for accelerated installation. Reading the entire contract in a light giving meaning to the whole, we perceive no error in the district court's conclusion.[11]

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[10] DELIVERY

Seller shall be excused for any delay in delivery, or any part delivery, hereunder, if caused by fire, explosion, flood, epidemic, war, interruption or delay in transportation, labor troubles or any cause beyond its reasonable control. In case of delay caused by Buyer's failure to furnish necessary information as to details to be determined by Buyer, Seller may extend date for shipment for at Seller's factories. In case shipment shall be delayed by Buyer's a reasonable time, based on period of Buyer's delay and conditions failure to furnish shipping instructions on request, or otherwise by Buyer, Seller may as [sic] its option invoice material ready for shipment, and payment therefore shall be made in accordance with the terms hereof, substituting the invoice for the Bill of Lading.

[11] Baker Perkins also appeals the directed verdict on the issue of contract start-up date. We perceive no error in the court's memorandum opinions of August 18, 1987, and January 23, 1990, in

Evidence of Damages

Baker Perkins asserts that Cotton Bros.' claims should have been dismissed for lack of legally-sufficient evidence causally linking Baker Perkins' breach of contract with the damages Cotton Bros. sustained. Baker Perkins' argument is a threefold contention that: (a) the consolidated books of the Cotton Bros. family of corporations were used rather than only Cotton Bros.; (b) the contract damages were not separated from the fire damages; and (c) Cotton Bros. relied on faultily-prepared regression analysis studies for its profits projections.

We find each of the arguments unavailing. Our standard of review for consideration of attacks on jury damage awards is well-settled. We "consider[] all the evidence and avoid[] second-guessing conflicts in the evidence or credibility determinations. This court will not disturb a jury verdict based on substantial evidence and reasonable inferences." *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1090 (5th Cir. 1988) (citations omitted).

With respect to the consolidated Cotton Bros. accounts, this evidence was appropriate given the district court's reformation of the Baker Perkins contract. The district court noted Baker Perkins' longtime association with the Cotton Bros. operation and its understanding of how Cotton Bros. operated. Moreover, substantial evidence was introduced explaining how Cotton Bros. mitigated its damages: by shifting Alexandria production throughout its corporate family of bakeries. In that light, the district court did not err in permiting evidence of Cotton Bros.' damages to be presented on the basis of the consolidated financial records of the corporation.

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which it held that the start-up date contemplated for the contract, based on the actions of Baker Perkins, was September 21, 1981. The district court further correctly held that Baker Perkins proffered no evidence probative on why it could not have performed the contract within that time frame and thus declined to present the issue to the jury.

Baker Perkins' argument that the evidence did not link its breach of contract with the damages alleged was specifically rejected by the district court. Within the thousands of pages of transcripts generated at trial are numerous indications of the methodologies used to project loss and the dates upon which the liability of Baker Perkins was calculated. "Obviously," argues Baker Perkins, "the fire caused far greater damage than any delay which may have been caused by Baker Perkins." That fact, however, is neither obvious nor proven on the record. What *is* clear from consideration of the evidence is that after the jury was presented both sides of the argument, it was instructed specifically on the requirements under state law that a causal link be proven between the breach and the damages alleged,[12] and arrived at a reasonable calculation of both the damages and the degree to which Cotton Bros.' own fault contributed to the delay in the

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[12] The district court instructed:

> The primary aim or principal of the law of damages for breach of contract is to place the plaintiff in the same position in which he would have been if the contract had been fulfilled. Or to place the plaintiff in the same position which he would have occupied had the breach of contract not occurred. In determining whether Cotton Brothers had sustained any damages attributable to Baker Perkins breach of contract, you must keep in mind that under Louisiana law first damages in breach of contract must be proven with reasonable certainty and secondly a claim for the lost profits cannot be supported by a mere statement of loss nor by speculation or conjecture unless direct evidence is unavailable. But in cases where direct evidence is not available to establish the exact extent of loss caused by a breach of contract report [sic] the customary or foreseeable profits as a measure of damages is proper. In other words, it is Cotton Brothers['] burden to prove by a preponderance of the evidence that the damages Cotton Brothers claims from Baker Perkins including loss of profits were in fact sustained and if so, that such damages were caused by Baker Perkins. Under Louisiana law a party to a contract remains responsible for the damages caused by its breach of that contract so long as the other contracting party has acted reasonably and within its legal rights.

start-up date. Our review of the evidence discloses no grounds upon which to disturb the findings of the jury.

Finally, Baker Perkins argues that the trial court erred in allowing Cotton Bros. to employ the "least squares" method of regression analysis to calculate the projected earnings component of its lost earnings, basing its projections solely on past earnings data. Baker Perkins was afforded ample opportunity to cross-examine witnesses who undertook the projections in question, and to present evidence contrary to the testimony of opposing witnesses. *Cf. Wilkins v. University of Houston*, 654 F.2d 388, 403 (5th Cir.1981) ("Ideally, when a multiple regression analysis is used, it will be the subject of expert testimony and knowledgeable cross examination from both sides. In this manner, the validity of the model and the significance of its results will be fully developed at trial, allowing the trial judge to make an informed decision as to the probative value of the analysis."), *vacated*, 459 U.S. 809, 103 S.Ct. 34, 74 L.Ed.2d 47 (1982), *on remand*, 695 F.2d 134 (5th Cir.1983). While the least squares method is subject to misuse, we do not find that its use in this instance gave a legally insufficient basis for the jury to make its findings. The district court did not err in permiting the evidence.

Baker Perkins' Claim for the Unpaid Contract Price

Baker Perkins argues that the trial court erred by directing a verdict against its claim for the $209,000 contract balance which Cotton Bros. stipulates remains unpaid. We agree. The district court found that Baker Perkins could not charge Cotton Bros. for that portion of the contract price attributable toward accelerated performance as Baker Perkins failed to perform its obligations timely.[13] Lousiana law provides that "[i]n case of

[13] We note further that only $165,575 of the $209,000 was allocable toward the acceleration premium; the remainder constituted accounts payable from contracts not directly involved in this litigation.

reciprocal obligations, the obligor of one may not be put in default unless the obligor of the other has performed . . . his own obligation." La.C.C. art. 1993. Cotton Bros. may only collect damages for Baker Perkins' failure to perform its obligations under the accelerated schedule if it pays the acceleration premium. This is especially true in a case in which Cotton Bros. has successfully argued in the IRI litigation that it is due compensation from its insurer for having paid the acceleration premium. The trial court erred; Baker Perkins is due this sum.

Prejudgment Interest

Baker Perkins contends that the trial court erred by awarding prejudgment interest from the date of judicial demand rather than the date of entry of judgment. The crux of this contention is that the amount Baker Perkins owed Cotton Bros. was not ascertainable until judgment was granted. Baker Perkins relies on *Alexander v. Burroughs Corp.*, 359 So.2d 607 (La.1978), as support for its argument. That case lends little succor to Baker Perkins' position. *Alexander* was a redhibition case in which the plaintiff (a receiver for a computer purchaser), sought and received damages for the redhibitory defect and attorneys' fees. The court discussed the long-standing issue of whether legal interest ran from the date of formal demand for rescission or from the date of judgment, and held that the plaintiffs' claim was ascertainable on the former. The court further held that legal interest on attorneys' fees, which were not awarded until entry of judgment, were to be dated from that day as that was the date at which they became ascertainable. 359 So.2d at 613-14.

Baker Perkins takes the attorneys' fees portion of *Alexander* and stretches it to encompass the facts at bar. Its contention is that the precise amount of damages were not determined until the jury rendered its verdict.

A more recent case, *Mini Togs Products, Inc. v. Wallace*, 513 So.2d 867 (La.App.1987), carefully explains *Alexander* and its codicil precedents in the context of a contractual—rather than redhibitory—dispute and arrives at a lucidly-explained conclusion that contract damages, even though unliquidated and not precisely ascertainable until judgment, are "due from the moment of active violation of the contract or from the time defendant was put in default which was no later than the commencement of the suit. Defendant's debt or obligation to pay money damages bears legal interest from the time the damages were due." 513 So.2d at 874. The court based its conclusion on an analysis of the *Alexander* court's use of "ascertainable."

> In using the term "ascertainable" the court did not mean that the precise amount of the claim need be liquidated or established without dispute in order for legal interest to commence in a contract claim. In the *Alexander* case the amount of recovery was in dispute throughout with the amount awarded by the district court being changed by the court of appeal and then again by the supreme court. What was meant was that a debt or claim for the payment of money or damages under a contract is ascertainable and becomes due on the date an active violation occurred or the obligor was put in default, which can be earlier but never later than judicial demand, and legal interest runs from that date.

Mini Togs, 513 So.2d. In light of this recent appellate explanation of *Alexander* by former Chief Circuit Judge Pike Hall,[14] Baker Perkins' argument to the contrary is not persuasive. *Cf. Meeks v. Huntington Sch., Inc.*, 489 So.2d 435 (La.App.1986) (finding fault with *Alexander*, and holding that in salary case, the dispute is whether interest dates from due date or date of judicial demand,

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[14] Now an Associate Justice of the Louisiana Supreme Court.

and settling on the former). Interest accrues from the date of judicial demand; the district court did not err.

Conclusion

The trial court erred by awarding Cotton Bros. a double recovery as against IRI, and Cotton Bros.' judgment for claims arising from its business interruption insurance is MODIFIED to $912,238.03. The district court's award of statutory insurer penalties is likewise MODIFIED to reflect only a penalty on the amounts awarded, $484,877.36 for the business interruption, and $324,735 in expediting expenses.

The district court erred as a matter of law by directing a verdict against Baker Perkins in its $209,000 claim against Cotton Bros. That judgment is REVERSED, and judgment is RENDERED in favor of Baker Perkins on that claim.

Subject to the modifications contained herein, the judgments appealed are AFFIRMED.[15]

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[15] For clarity, we restate that all of the judgments now before the court are rendered as follows:

1. Cotton Bros. v. IRI. Modified and rendered in the amount of $912,238.03. Affirmed in the amount of $324,735. Subtracting the equitable credit of $427,460.67, the net judgment is $809,613.40 plus prejudgment interest and 12% penalties dating from January 12, 1983.

2. Cotton Bros. v. Baker Perkins. Affirmed in the amount of $1,342,624. Prejudgment interest to date from February 7, 1984.

3. Baker Perkins v. Cotton Bros. Reversed and rendered in the amount of $209,000. Prejudgment interest to date from February 21, 1984.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

Civil Action No. 83-0150

COTTON BROTHERS BAKING COMPANY, INC.

versus

INDUSTRIAL RISK INSURERS

Civil Action No. 83-0578

COTTON BROTHERS BAKING COMPANY, INC.

versus

BAKER PERKINS, INC.

Civil Action No. 83-3237

BAKER PERKINS, INC.

versus

COTTON BROTHERS, INC.

For Cotton Brothers Baking Company, Inc.:

DERMOT C. MCGLINCHEY and HENRI WOLBRETTE, III
MCGLINCHEY, STAFFORD, MINTZ & CELLINI
653 Magazine Street
New Orleans, LA 70130

FREDERICK B. ALEXIUS
PROVOSTY, SADLER AND DELAUNAY
Hibernia National Bank Building, Eighth Floor
Alexandria, LA 71301

For Industrial Risk Insurers:

P. ALBERT BINEVENU, JR., and JOHN W. WATERS, JR.
BIENVENU, FOSTER, RYAN & O'BANNON
1400 American Bank Building
New Orleans, LA 70103

HOWARD B. GIST, JR.
GIST, METHVIN, HUGHES & MUNSTERMAN
Post Office Box 1871
Alexandria, LA 71301

For Baker Perkins, Inc.:

ESMOND PHELPS, II
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
Thirtieth Floor, Texaco Center
400 Poydras Street
New Orleans, LA 70130

NAUMAN S. SCOTT
United States District Judge

OPINION

[Filed Jul. 31, 1989]

We have jurisdiction under 28 U.S.C. 1332. There is diversity of citizenship between the plaintiffs and the

defendant and the matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

Plaintiffs reside in and the instant claim arose in the Western District of Louisiana. Venue therefore lies in this district under 28 U.S.C. 1391(a).

Plaintiffs Cotton Brothers Baking Company, Inc. (Alexandria bakery) and Cotton Bros. Inc. (parent company) have brought suit against Industrial Risk Insurers (IRI) claiming damages under an interruption of business policy (IRI policy) issued by IRI on October 1, 1980 in favor of three (including Alexandria bakery) of five corporate bakery subsidiaries owned and operated by Cotton Bros., Inc. Cotton Bros., Inc. was not included in the IRI policy as a named insured.

The interruption of business occurred as the result of a fire in the Alexandria bakery plant, Alexandria, Louisiana on February 13, 1981.

Under the provisions of the IRI policy the only named insured eligible to bring suit for an interruption resulting from a fire on the property of the Alexandria plant was Cotton Brothers Baking Company, Inc. Suit was filed on January 12, 1983 against IRI for loss or reduction of gross earnings as provided in Sections IA and IIA of the IRI policy (earnings damages) allegedly suffered by the Alexandria bakery during the period of interruption following the fire of February 13, 1981. The principal issue between the parties during the entire period of trial from the middle of September 1986 until the Friday before Christmas of that year was the methodology to be used in the determination of earnings damages as provided in the policy under Sections IA and IIA. Plaintiff contends that the books and the records of the parent corporation are the only books and records from which such damages can be compiled. IRI has not paid any earnings damages as provided under Sections IA and IIA based on the records of its named insured Cotton

Brothers Baking Company, Inc. (Alexandria bakery). IRI simply refuses to recognize any damages except those compiled on an item by item basis in which each item claimed must be shown to be a direct result of the fire. IRI made a general objection to any evidence based on the books and records of the parent company because the parent company was not a named insured under the IRI policy.

This case was tried by the plaintiff, Alexandria bakery, and the defendant, IRI, until our ruling on the fourth day of May 1988. On November 4, 1987, plaintiff Alexandria bakery, filed a post-trial motion to permit the filing of a second supplemental and amending complaint. The said complaint prayed that the parent company, Cotton Bros., Inc., be made a party to this suit and that the interruption of business policy issued by IRI on October 1, 1980 be reformed so as to include Cotton Bros., as a named insured effective October 1, 1980. In our rulings of May 4, 1988 and July 27, 1988 we allowed the supplemental and amending complaint to be filed, made Cotton Bros., Inc. a party plaintiff effective from the commencement of suit, but refrained from considering and deciding the reformation of policy issue until a hearing could be had at which the parties would have an opportunity to introduce additional evidence. That hearing was held on Febrary 27, 1989 and subsequently authorities were submitted by both parties. We now consider, (1) the issue of whether the policy issued by IRI on October 1, 1980 should be reformed so as to include Cotton Bros., Inc. as a "named insured" effective October 1, 1980 and (2) all other issues remaining for decision in this proceeding.

To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as Conclusions of Law; to the extent any of the following Conclusions of Law constitute Findings of Fact, they are adopted as such.

FINDINGS OF FACT

1. Cotton Brothers Baking Company, Inc. and Cotton Bros., Inc. are Louisiana corporations with their principal place of business in Alexandria, Louisiana. Defendant Industrial Risk Insurers is an unincorporated association with its principal place of business located outside the State of Louisiana. No member thereof is a citizen of Louisiana. The fire of February 13, 1981 occurred in Alexandria, Louisiana in the Western District of Louisiana and plaintiffs' claims in this proceeding exceed the sum of $10,000.00.

2. In 1952 and for some time thereafter the Cotton interests (Cotton) consisted of one bakery located in Alexandria, Louisiana.

3. Therafter and prior to 1976 Cotton acquired three additional bakeries located at Shreveport and Baton Rouge, Louisiana and Natchez, Mississippi. After these acquisitions the four bakeries continued to operate independently and in competition with each other in all fields, including management, production, and sales to the public.

4. At some time prior to 1970 Cotton became interested in protecting these separately and independently operated bakery businesses from financial loss of income induced by fire or other similar or named peril.

5. With this objective in view Cotton, through its agent Alexander & Bolton (A & B), discussed with IRI the relative merits of coverage: 1. by extra expense insurance or 2. by interruption of business insurance. Extra expense insurance is a form of insurance coverage to reimburse the insured for specific items of extra expense over and above the normal expense which the insured incurred as a result of damage to the insured's property by an insured peril such as fire. Damages under such a policy have no connection whatsoever to the gross earnings of the insured.

An interruption of business policy insures the owner of a business against reduction or loss of gross earnings during the period of interruption. Damages consist of the reimbursement of gross earnings lost in the insured's business less the recurring expenses which do not continue during the period of interruption. Needless to say the principal item of damages in such a policy is the loss or reduction of gross earnings as shown on the books of the insured's business. Also included in damages under an interruption of business policy are items of extra expense necessarily incurred for the purpose of reducing loss under the policy and such expenses, in excess of normal, as would necessarily be incurred in replacing any finished stock used by the insured to reduce loss under the policy.

6. On or about 1970 Cotton and IRI chose business interruption type coverage. *Both Cotton and IRI intended at that time and at all times thereafter through October 1, 1980 to give the Cotton bakery operation full and complete interruption of business coverage.* To accomplish this in 1970 IRI issued a separate policy to cover each of four bakeries. In this way they achieved the intent of both parties because each of the four bakery corporations carried on its own separate and individual operation and business. Actually they were in competition with each other. Each of these bakery corporations was operating independently and separately with no interdependence between them, manufacturing its own production for sale on the open market, packaging its own finished products, and selling to its own customers. Therefore the books of each corporation could serve as a basis for the determination of gross earnings and any increase or reduction of gross earnings over a period of time. In this way the common intent of both parties was achieved and complete business interruption coverage of the entire Cotton bakery operation continued until the reorganization of 1976.

7. In 1976 the Cotton bakery operation was completely reorganized. The parent company, Cotton Bros., Inc.,

was created and thereafter operated the Cotton bakery operation through seven wholly-owned subsidiaries, as one single bakery business. The seven wholly-owned subsidiaries consisted of the four bakery corporations previously owned by Cotton and three newly created non-bakery subsidiary corporations: an insurance subsidiary, a transportation subsidiary and a procurement subsidiary. The insurance subsidiary handled all the health and welfare, self-insurance and other insurance responsibilities of the parent corporation and all subsidiaries. It did not do business with the general public. The sole responsibility of the transportation subsidiary was to furnish and satisfy the transportation needs of the parent corporation and its subsidiaries. Like the insurance subsidiary it did no business with the general public. The sole responsibility of the procurement subsidiary was to furnish raw materials, supplies and equipment required by the parent company and its subsidiaries. Like the other two non-bakery subsidiaries, the procurement subsidiary did no business with the general public.

After reorganization none of the bakery subsidiaries produced the entire variety of bakery products it sold to the public, as each of them had done previous to the reorganization. An entirely new system of production was introduced. The parent corporation dictated or allocated to each bakery subsidiary the type and amount of bakery items each could produce, the amount that each could retain for its own customers, to whom each could ship the remainder and the amount and price at which these shipments could be made. Thus the entire production of each was dedicated to the single bakery business of the parent corporation, Cotton Bros., Inc.

All of this was accomplished under the direction of Gene Cotton. When the parent corporation and the three non-bakery subsidiaries were created in 1976, these three non-bakery subsidiaries as well as the four formerly independent bakeries became wholly owned subsidiaries of

the parent corporation. Gene Cotton, president and chief executive officer of the parent corporation, was also president and chief executive officer of all seven subsidiaries. As such he had the power and control to carry out, on a day to day basis, in detail the aims and purposes of the reorganization and to see that the aims, policies and efforts of all subsidiaries, including the bakery subsidiaries, were dedicated to the promotion and success of the single bakery business operated by the parent company. Thus the bakery subsidiaries lost all semblance of their former independence. They no longer controlled their health and welfare and other insurance, their transportation or their procurement needs. Since Gene Cotton was president and chief executive officer of each supplying subsidiary as well as each consuming subsidiary, he set the terms and conditions of all contracts and agreements between the subsidiaries; including price, at which all these inter-subsidiary services were provided. Thus none of the agreements or contracts between the seven subsidiaries were arm-length transactions negotiated and concluded by officers motivated by the separate and independent interest each of the subsidiaries involved, but rather by the interest of the parent corporation—the single operation. In every instance these contracts amounted to Gene Cotton, wearing one hat, doing business with Gene Cotton wearing another hat, for the open and declared benefit of Gene Cotton wearing the hat of the parent company.

8. A very clear illustration of the monumental effect which the reorganization had on the previously independent bakery corporations is furnished by the experience of the Natchez bakery subsidiary. After reorganization that plant produced nothing but sweet goods such as pies, cakes, pastries and breakfast bakery products. Ninety percent of that output was shipped to the three other bakery subsidiaries under contracts dictated and controlled by the parent company. These shipments were delivered to the other three bakery subsidiaries by trans-

port units furnished by the transportation subsidiary under contracts dictated by the parent company. In order for Natchez to compete in its sales area it was necessary for Natchez to acquire from the three other bakery subsidiaries all the rolls, buns, brown and serve, and various types of loaves, etc. which it sold to the public. If the comptroller was right in estimating that sweet goods provided twenty percent of the total bakery goods necessary to compete on the market then the sweet goods retained by Natchez comprised twenty percent of the bakery products sold by Natchez in its sales to the public. Thus Natchez had to acquire eighty percent of the products sold by it in its sales area from the other three bakery subsidiaries. With its health, welfare and other insurance items, its transportation needs, its procurement needs furnished under controlled contracts; ninety percent of its production sold to the three other bakery subsidiaries under controlled contracts, and eighty percent of the products sold by it being acquired by controlled contracts, there is absolutely no way that the Natchez operations could be considered an independent bakery business or that its books could reflect a genuine and actual loss or gain of gross earnings, as if it were a separate business. We find that the reorganization converted the Cotton bakery operation into one single bakery business owned and operated on a day to day basis by the parent company: that the books and records of the parent company were the only books and records which could serve as a basis for determining gross earnings of the Cotton bakery business and that the books and records of none of the bakery subsidiaries could serve this purpose.[1]

9. Nevertheless in 1976 IRI, on its own initiative and without any request or direction from Cotton, abandoned its practice of issuing four separate interruption of business poliices to cover each of the Cotton bakeries. Why

[1] In its post hearing suggested findindgs and conclusions and supporting briefs, IRI does not address these issues.

did IRI issue a single combined policy? IRI states that it did so because the four bakery subsidiaries had become "interdependent". A glance at any Webster's dictionary will disclose that this term means "to depend upon one another", "mutual dependence" and "mutually dependent". How did IRI know that they had become "interdependent" and what were the changes in operation which made them "interdependent"? IRI knew that the parent company, Cotton Bros., Inc., had been created; that Cotton Bros., Inc. was now the sole owner of seven subsidiaries including the bakery subsidiaries; that Gene Cotton, president and chief executive officer of the parent company, was also president and chief executive of each of the seven subsidiaries; that, through its exclusive ownership and exclusive direction, the parent company had assumed and exercised absolute control over the day to day operation of each of the bakery subsidiaries; that the parent company had utilized its absolute control to reallocate the production of each of the bakery subsidiaries; that as a result of this reallocation each of the bakery subsidiaries had ceased to produce the entirety of the bakery products which it sold to the public. In fact, none of them produced even one-half of the production which each of them sold to the public. These are the changes in operation by which the bakery subsidiaries became "interdependent".

IRI had to have knowledge of these changes to conclude that the bakery subsidiaries were in fact "interdependent". Certainly IRI was aware of the most important element of "interdependency"—the reallocation of production. IRI was the fire insurer, and as fire insurer, made frequent inspections of each bakery's machinery, equipment and safety devices, especially at this time of unusual change. Those IRI inspectors were certainly aware of the exchange and relocation of machinery and equipment made necessary by the reallocation of production between the bakery subsidiaries and also the results in terms of the amount and type of production each

bakery subdivision was required to produce. Both Cotton and IRI intended to give full interruption of business coverage to the Cotton bakery operation. But having all the factual information necessary to make the determination, they simply failed to realize that the reorganization had merged the four formerly independent bakery businesses into one single bakery business owned, managed and operated by Cotton Bros., Inc.[1]

10. The evidence establishes beyond possible doubt that the single policy issued by IRI in 1976, omitting Cotton Bros., Inc. as a named insured, was intended to cover the flow of gross earnings from the combined production of the four bakery subsidiaries owned, managed, operated and controlled as a single business by Cotton Bros., Inc. It was the mutual mistake of IRI and Cotton that Cotton Bros., Inc. was not identified as the sole named insured. Having made the mistake when the policy was issued, IRI certainly should have realized the mistake and corrected it in April of 1977 when A & B, in correspondence with Mr. Penn of IRI, questioned the validity of the coverage and disclosed that production of the Natchez plant was restricted to sweet items and that ninety percent of that production was shipped to the other three bakery subsidiaries. Mr. Penn brought an end to the correspondence by assuring A & B that the Cotton business was fully covered by the "blanket policy" concept. Mr. Penn never explains how the "blanket policy" concept is to be applied to earnings damages under Sections IA and IIA of the policy. Certainly IRI paid no such damages in this case.

IRI's failure to include Cotton Bros., Inc. as a named insured on the policies of 1976 and 1980 effectively deprived Cotton of its right to make a claim under Sections 1A and 11A of the policy (earning damages), the specific risk that IRI was paid to cover.

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[1] In its post hearing suggested findings and conclusions and supporting briefs, IRI does not address these issues.

11. Although the failure to name Cotton Bros., Inc., in the policy was the mutual mistake of Cotton and IRI, that mistake was initiated by IRI which issued the single policy on its own form without a request or direction from Cotton. When IRI issued its policy of October 1, 1980, the Cotton bakery business still was operating in the manner in which it had been reorganized in 1976 except that Cotton Bros., Inc. had acquired an additional bakery (Monroe, Louisiana). There were now five bakery subsidiaries instead of four. IRI continued to require its worksheets from the separate baker subsidiaries, but all these worwsheets, at least all of those in evidence, were signed by the comptroller or the vice-president of finance of the parent company. Changes in operation for the purposes of efficiency or economy were made repeatedly, ignoring completely that each of the subsidiaries was separately incorporated. For instance, customer routes were regularly transferred from one bakery subsidiary to another. Officers in the subsidiaries were promoted to the parent company.

On October 1, 1980, IRI simply renewed the policy of 1976. There is no doubt that both Cotton and IRI intended on October 1, 1980 that the IRI policy give full and complete coverage to the Cotton bakery business. It failure to do so was the mutual mistake of Cotton and IRI.

12. On Friday, February 13, 1981, a fire erupted in the Alexandria bakery on U. S. Highway 71 South in Alexandria. The Alexandria bakery was the largest of the bakery subsidiaries. It contained three production lines. Its principal line was a combination line which produced brown and serve and loaf bread. One small line produced burger buns and the other small line produced hard bread and hard buns. The combination line was almost completely destroyed. Brown and serve comprised 75% to 80% of the Alexandria bakery's production. None of the other subsidiaries produced brown and serve. Alexandria was Cotton's sole source of that production.

13. The effect of the fire on the Alexandria bakery and on the Cotton bakery business was serious. The parent company was unable to produce loaf bread and brown and serve products in its Alexandria plant over the months of the interruption. For a less lengthy time is could not produce from the small lines. These products had to be purchased from competitors at prices higher than Cotton's costs of manufacture. At times the inferior quality of the purchased items caused dissatisfaction among Cotton customers and even provoked cancellation of purchase contracts. Other forms of disruption were the questionable success of making up production from other plants; the utilization of normally productive workers (as far as the production of bakery products was concerned) in non-productive work such as the very substantial clean-up operation, unforeseen repairs and the gigantic job of installing replacement equipment under supervision of Baker Perkins representatives. Accounting personnel had to take substantial leave from normal responsibilities to aid specially hired accountants in the company's attempts to determine its losses. Immediately after the fire, Gene Cotton and a number of other Cotton officials were totally involved in clean-up efforts; in negotiations with IRI and with Baker Perkins trying to determine what repairs or replacement would have to be made to restore the facilities that were destroyed by fire; securing contract proposals, accelerating those proposals, determining the final contract and the financing of the contract. There was continuous contact with the same parties in their efforts to accelerate the performance of the replacement contract to the evident advantage of both the parent company and IRI. Also involved were the increased costs and involvement of transportation vehicles and personnel. Indeed the effect of the fire on the parent company's bakery business was more than serious, it was devastating.

14. On the very day of the fire Gene Cotton contacted Baker Perkins to send a representative to Alexandria to

examine the extent of the fire damage for the purpose of making proposals for the repair or replacement of the damaged facilities as expeditiously as possible. Two or three days thereafter Cotton, with the knowledge and consent of IRI, flew to Saginaw, Michigan to receive and discuss Baker Perkins' proposals and to conclude a contract as soon as possible. Gene Cotton chose Baker Perkins for this endeavor because Cotton had been doing business with Baker Perkins since 1953. Most of Cotton's equipment, including the oven and the proofer and some of the other equipment involved in the fire, had been manufactured by Baker Perkins. Baker Perkins was therefore the manufacturer most familiar with the plant and with the capabilities, the location and the pattern of operation of Cotton's machinery and equipment.

Baker Perkins first presented two proposals, one a repair proposal and the other a replacement proposal. Under the former proposal Baker Perkins was to complete repairs of the oven and proofer by January 1982 at a cost of $1,030,085.00. However, this was not a firm contract. Since Baker Perkins had not been able to make an accurate determination of the damage to the oven, and might not be able to do so until the repaired equipment was in operation, it reserved the right to take additional time and make additional repairs and charges if such repairs became necessary. Secondly, Baker Perkins proposed to replace the proofer and the oven by June 1, 1982 for the price of $1,189,245.00. With the knowledge and consent of IRI, Gene Cotton rejected these proposals because of the long length of time required for installation. At the vigorous urging of Gene Cotton, Baker Perkins submitted a third proposal. For an increased price of $1,354,820.00 Baker Perkins would accelerate replacement so as to assure "start-up" of normal production by September 21, 1981. Cotton, as IRI was aware, was depending on money to be received from IRI in the adjustment of Cotton's claims under the fire policy. The sig-

nificant reduction in the length of the business interruption period was mutually beneficial to IRI and Cotton. Cotton, with the approval of IRI, accepted the third proposal.

15. The Alexandria fire illustrates the extreme interdependence of the various Cotton subsidiaries and the absolute futility of omitting Cotton Bros., Inc. as the named insured. The bakery business, at the level at which Cotton was competing, is a very demanding business. The entire production for today is on customer shelves tomorrow. The pressure to produce required Cotton to operate its bakeries 20 hours a day, 6 days a week. There is no surplus inventory at either end of the delivery route to ease the impact of mistake or delay. In order to compete, the bakery products had to be fresh. The crisis here was far different from the crisis which would have occurred if the Alexandria bakery was still operating as a separate and independent business on October 1, 1980. An independent operation in Alexandria would have affected only production and customers of the Alexandria bakery. The evidence here precludes such a finding. In this instance, the parent corporation was relying on its Alexandria subsidiary to furnish certain bakery items, principally brown and serve, to all of its other bakery subsidiaries. The inability of the Alexandria bakery to produce brown and serve was not felt by the Alexandria bakery alone. Every bakery subsidiary in the Cotton operation lost its allocated portion of that production. The Alexandria customers were no more severely affected that those of Shreveport, Baton Rouge, Monroe or Natchez. Certainly the customers of the other bakery subsidiaries were not arms length customers of Alexandria. The reorganization had indeed converted five independent bakery businesses into one business owned, controlled and operated on a day to day basis by the parent corporation.

16. Gene Cotton was *the* expediter in this crisis. He had the problem of maintaining an unusually high cash

flow to continue operating the highly complex and competitive business described above. Suddenly he had in addition, the responsibility and tremendous expense of immediate replacement of a major portion of the parent company's production, by purchase from competitors, by establishing new lines in other bakery subsidiaries, by reallocation or otherwise; an unexpected clean-up operation; the fate of employees idled by the fire; the restructuring of transporation and procurement to meet the crisis and, most importantly, the execution and performance of a replacement or repair contract.[2] Although it was important to IRI that the interruption be terminated as soon as possible, it was infinitely more important to Gene Cotton and his business to achieve this result. He had an additional problem. He did not have the money to do it. IRI knew this. Baker Perkins had required that the proofer and oven replacement contract be executed on or before February 22, 1981. Gene Cotton had negotiated the contract and could have accepted it immediately, had the funds been available. Funds did become available from IRI on March 6, 1981, and Cotton instantly telephoned his acceptance to Baker Perkins, which did not protest the delay. The major portion of the testimony by deposition of R. F. Kelley, President of Baker Perkins, was his amazement, mounting irritation and annoyance at Gene Cotton's continued, unending and persistent demands for more speed, for quicker deliveries.

Gene Cotton was able to retain some of the employees made idle by the destruction in the Alexandria plant. He continued their employment and used them initially in "clean-up" operations and later in the installation of equipment under supervision of Baker Perkins. At other times they were free to perform whatever duties the

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[2] For a picture of the situation immediately following the fire see reports of meetings held by representatives of Cotton Bros., Inc., IRI and others. Exhibits P-67, 68A, 101, 122 and 122A. (par. 16)

Alexandria bakery could find for them, such as the clean-up and/or maintenance of equipment idled or less severly damaged by the fire. IRI has alleged that Gene Cotton contributed to the delay by directing these employees to take a Christmas vacation and to perform duties other than their duties under the supervision of Baker Perkins. The record reflects, as noted by Mr. Kulzer below, that there were many periods, sometimes extended periods, when Baker Perkins failed to make scheduled deliveries of equipment for installation. Cotton's employees could not install equipment when the equipment had not yet been delivered. Certainly Cotton could not allow them to remain idle during the periods of non-delivery. IRI has failed to produce any protest by Baker Perkins or any evidence indicating what particular Baker Perkins installation was delayed or for what period of time, or that Gene Cotton had anything to gain by delaying Baker Perkins. We find that due diligence and dispatch was exercised by plaintiffs to rebuild, repair or replace the property and equipment destroyed and/or damaged by the fire as required by the IRI policy.

In a state of desperation at Baker Perkins' lack of performance, Gene Cotton hired a responsible and trusted employee of Baker Perkins, James Reid (Reid) in February, 1982. Reid was the very person whom Baker Perkins had sent to Alexandria on the day after the fire to estimate and ascertain the damage done by the fire. All Baker Perkins' proposals for repair or replacement were based on his findings. IRI's Mr. Kulzer noted in his August, 1982 report the efforts by Gene Cotton to reduce the delays caused by Baker Perkins:

> "As previously reported, Baker-Perkins incurred delays in shipping and installing the equipment. *The insured constantly attempted to push B-P's schedules and has documented his steps carefully.* His smartest action was to hire Janus [sic] Reid away from B-P shortly prior to shipment of the equipment. Mr. Reid

> supervised and expedited the instllations and obviously prevented further delays in start up with his deep knowledge of the equipment and personal relationship with the B-P installations." (emphasis ours)

IRI's contention that Gene Cotton was more interested in modernization of the equipment, than he was in the installing of it, is not tenable, especially when IRI mentions no instances in which such alleged activity affected or delayed any specific Baker Perkins installation. In any operation when the damaged or destroyed equipment is replaced by new equipment, to install is to modernize. The atmosphere of the meetings between plaintiffs and IRI establishes that Gene Cotton was the individual who made, far and away, the most vigorous and dedicated effort to expedite the end of the interruption period. The financial crisis brought on by the fire, the lack of cash flow, could be remedied only by the resumption of normal production by the Cotton bakery operation. Gene Cotton stated this position repeatedly, and his actions were consistent with it.

17. Although specification of a period of interruption can never be exact, we find that Cotton exercised the required due diligence and dispatch to rebuild, repair or replace, at the earliest date possible, the property and equipment destroyed in the fire of February 13, 1981 and that production equal to February 13, 1981 production was achieved on May 8, 1982. See paragraph 28, infra.

We agree with IRI that the delidder did not replace any equipment damaged or destroyed by the fire. Before the fire the delidding operation was accomplished manually by two employees. This activity occurred at the end of the interruption period when most of the other equipment had already been installed so that it did not interfere seriously with installation of other equipment. However it did have the effect of extending that period. We

find that 3% of the interruption period was caused by the installation of this equipment and that Cotton Bros. Inc. was responsible for that delay.

However, we find that Cotton's responsibility for delay is offset by the delay occasioned by IRI's refusal to pay the $1,354,820.00 March 6, 1981 proof of loss to Cotton under IRI's fire policy for the destruction of Cotton's oven and proofer. See par. 24, infra. IRI was in contact with Baker Perkins throughout the period around March 6, 1981 when Cotton verbally accepted the accelerated contract to replace that equipment. Within days after that acceptance Baker Perkins President Kelly issued an interoffice memorandum halting performance of Baker Perkins' accelerated replacement contract until further notice. We find no explanation for this inappropriate action except Baker Perkins' knowledge of IRI's refusal to pay the March 6, 1981 proof of loss. Baker Perkins' February 22 deadline had already been exceeded by 12 days. IRI's unlawful actions forcing Cotton to convert $324,735.00 of the agreed fire loss to expediting expense under the interruption of business policy consumed at least seven or eight additional days. If that delay caused Cotton to lose favorable placement in Baker Perkins' list of orders, the delay could be even more substantial.

We find therefore that both Cotton and IRI performed acts which may have delayed "start-up" to May 8, 1982. Although the extent of delay caused by each cannot be ascertained, we find that they were approximately equal so that neither party shall be penalized.[3]

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[3] We disagree with the jury in Civil Action 83-3237-A, Baker Perkins, Inc. versus Cotton Bros., Inc. There the jury determined that Baker Perkins, Inc. was responsible for 65% and Cotton Bros., Inc. for 35% of that portion of the business interruption period beginning September 21, 1981 and terminating May 8, 1982. We have found, on the other hand, that Cotton Bros., Inc. was responsible for 3% of the delay during that period, and that IRI was equally responsible so that neither of them shall be penalized.

18. IRI's contention that the adoption of Baker Perkins' repair proposal would have assured "start-up" in 45 weeks is irrelevant since IRI was as fully responsible as Cotton for rejecting the repair proposal and accepting the accelerated replacement contract.

It is also completely discredited by the evidence. The repair proposal, on its face, was not a firm proposal. It explicitly limited repairs to those defects apparent at the time of initial examination and, very significantly, did not cover defects which might be disclosed after the equipment went into operation. Baker Perkins reserved the right to require additional time and additional money to accomplish any repairs not apparent at the time of the original examination. In fact subsequent inspections disclosed that the proofer was a total loss and that the oven could not be repaired to meet safety standards. Neither could be repaired; both had to be replaced.

In addition, unlike the two replacement contracts which provided for "start-up" by June 1, 1982 and September 21, 1981, respectively, the repair proposal provided only that the *physical repair* of the proofer and the oven would be completed in 45 weeks. This language is on the face of the proposal. Mr. Reid who drafted the proposal for Baker Perkins emphasized repeatedly in his testimony that additional tests, including tests with dough in the pans, had to be completed successfully before "start-up" could be achieved. The time necessary to accomplish this is always uncertain. It could be three weeks; it could be three months. IRI's contention must be rejected.

19. Immediately after the fire, each of the parties formed a team of certified public accountants to adjust the plaintiffs' claims under the interruption of business policy. The plaintiffs' team was composed of members of Ernst & Whinney, CPAs, including Arthur J. Parham, and was headed by Percy Raybourn, Vice President of

Finance of Cotton Bros., Inc.[4] This team also included representatives from W. E. Long & Company, specialists in bakery operations. The team designated by IRI was composed of members of the firm, Matson, Driscoll & Damico, CPAs, led by Michael Driscoll, a senior partner in the firm.

None of the members of the Cotton team had any education, training or experience in the adjusting of insurance claims and particularly claims under interruption of busines policies. The IRI team, on the other hand, did have such experience; all of them were intimately familiar with and had been involved in the adjusting of interruption of business claims. Driscoll was not simply a CPA, he was offered by IRI and recognized by this Court as an expert in interruption of business insurance who had been involved in the adjustment or litigation of over one thousand interruption of business claims. In most of these instances, he had represented insurance companies and had been retained many times by IRI.

20. The IRI policy was intended to provide full coverage for the Cotton bakery business. The only named insureds were three of the subsidiary bakeries in the Cotton Brothers operation, located in Alexandria, Shreveport, and Natchez: Cotton Brothers Baking Company, Inc., Cotton Baking Company, Inc., and Cotton's Holsum Bakers, Inc., respectively. The policy did not mention Cotton Bros., Inc. as a named insured, although Cotton Bros., Inc. had been operating the Cotton bakery opera-

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[4] For reasons undisclosed by the record, a rift occurred between Cotton and Alexander & Bolton on or about the time of the February 13, 1981 fire. No member of that firm was included in the Cotton team or took part in the determination of Cotton's claim methodology or the drafting of interruption proofs of loss. There is no evidence that Cotton sought or received their advice on those subjects. The only evidence of any activity on their part was their attendance at some of the meetings mentioned in Note 2, supra, and Gene Cotton challenged their presence at those meetings.

tion as a single bakery business on a day to day basis since the reorganization of 1976. However, the policy described five locations (Alexandria, Shreveport, Natchez, Baton Rouge, and Monroe) as covered premises and further provided that the loss of any of these locations should be adjusted with and payable to the subsidiary bakery corporation located at the site of the loss. Separate coverage amounts were assigned to each location and aggregated on October 1, 1980 to $39,816,000.00.

21. We have found previously that both Cotton and IRI intended in 1976 and all times thereafter through October 1, 1980, to give the Cotton bakery operation full and complete interruption of business coverage. However, the fire on February 13, 1981, compelled IRI to reexamine its policy and its position as insurer under that policy. It had possessed, since the reorganization of 1976, all the information necessary to determine that the subsidiary bakeries, though still incorporated, had become so interdependent with the other subsidiaries and so completely controlled by the parent corporation that they were merely production plants for the bakery business owned, controlled and being operated on a day to day basis by the parent company.

Raybourn has testified that the indebtedness of the subsidiaries (except the procurement subsidiary) was paid out of the general fund of the parent corporation. If IRI did not know this prior to February 13, 1981, it certainly knew it shortly thereafter, when IRI had access to the books of these subsidiaries while auditing the claims submitted by Cotton. IRI knew specifically that all of the replacement equipment ordered in the name of the Alexandria plant; invoiced, shipped to, installed in, and belonging to the Alexandria plant; was paid for out of the general fund of Cotton Bros., Inc.

IRI, at some time during the auditing period and prior to September, 1981, knew that the IRI policy, as written, did not provide interruption of business coverage to the

Cotton bakery business as was intended by all parties to the policy. They knew that, after the 1976 reorganization, the bakery subsidiaries had lost their separate identities and had become so interdependent with the other subsidiaries and so dominated and controlled by Cotton Bros., Inc. that they were no longer viable and proper interruption of business insureds. Although IRI stoutly proclaims the validity of its policy, there is not one instance in which it has shown or even suggested that a claim for earnings damages can be supported by the books of the Alexandria bakery. Not one of its experts, including Driscoll, has made such a declaration. The fact that the books and records of the named insured. Cotton Brothers Baking Company, Inc. (the Alexandria bakery subsidiary), cannot serve as a basis for a claim for earnings damages under the IRI policy, is the basic element of IRI's strategy of defense to avoid the payment of earnings damages under Sections IA and IIA of the policy. It knew that Cotton Bros., Inc. was the only party owning and operating the Cotton bakery business so that Cotton Bros., Inc. alone had an interruption of business risk. Had IRI continued the good faith that it had exhibited during the 10 years that it had been collecting premiums from Cotton, it, on its own initiative, could and should have issued an endorsement making Cotton Bros., Inc. a named insured, thus providing Cotton the interruption of business coverage for which Cotton had paid. Instead, IRI chose to ignore the evidence before it; to profit by its inadvertent omission of Cotton Bros., Inc. as a named insured; to ignore its duty to correct that mistake so that the Cotton bakery business would receive the interruption of business coverage intended. This is the beginning of IRI's strategy to defeat interruption of business coverage by depriving the Cottons of access to the books and records of Cotton Bros., Inc. This effort began shortly after the fire of February 13, 1981, as above set forth and has continued to this day. From the very commencement of this proceeding, IRI has made

a continuing objection to the admission of evidence based on the books and records of the parent company to establish earnings damages as provided in the policy. Its sole basis for that objection is that Cotton Bros., Inc. is not a named insured in the policy. IRI's strategy is further reflected in the pleadings and throughout the trial of this suit including its strenuous opposition to the reformation of the policy. We find that IRI should have made Cotton Bros., Inc. a named insured on its own initiative at some time prior to September 1981, in order to give full interruption of business insurance coverage to the Cotton bakery business which had been operated by Cotton Bros., Inc. on a day to day basis since the reorganization of 1976. Indeed, upon a simple letter request it did make Cotton Bros., Inc. a named insured with no additional payment of premium by an endorsement dated July 28, 1982.[5] We find that its failure to make such an endorsement during the auditing period prior to September 1981 was a breach of its prior intent and its duty to give full interruption of business coverage to the bakery business owned and operated by Cotton Bros., Inc., IRI's failure to do so was part of a scheme to deny such coverage to Cotton and its failure to act was arbitrary, capricious and in absolute bad faith.

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[5] At the request of A & B, IRI, without protest, made Cotton Bros., Inc. a named insured by an endorsement dated July 28, 1982. Since there was no difference in Cotton's method of operation between October 1, 1980 and July 28, 1982, we consider this an admission by IRI that Cotton Bros., Inc. could have been included in the policy as a named insured on October 1, 1980. In order to carry out the intention of the parties and afford the Cotton bakery business the coverage it had been paying for since 1970, Cotton Bros., Inc. should have been so named.

The last paragraph of Post-fire Endorsement No. 8, dated September 26, 1981, was included at IRI's initiative and requested by no one. These endorsements establish that endorsements were regularly made by IRI in a most informal manner and on its own initiative.

22. IRI hired Matson, Driscoll & Damico on February 18, 1981, only five days after the occurrence of the fire. They were retained by IRI because, according to their testimony, they were not in the usual business of auditing but specialized in adjusting interruption of business claims. Driscoll was qualified and offered by IRI and accepted by the Court as an expert on the adjustment of interruption of business claims.

Cotton's team of auditors knew nothing about interruption of business insurance, but they did know that no items listed in any proof of loss submitted by them to IRI would be paid without the approval of IRI based on the recommendation of IRI's auditing team. Consequently, Percy Raybourn, by telephone, by personal contact and in meetings, sought advice, help and recommendations from Michael Driscoll and other members of IRI's team for developing a proper methodology to calculate Cotton's interruption of business losses.[6] The result—

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[6] Testimony of Arthur J. Parham, Jr., Tr. vol. 22 pp. 4978-4981.

Q What was your understanding, Mr. Parham, about what your task was regarding assisting Mr. Raybourn to prepare some sort of methodology for computing this claim?

A Mr. Raybourn indicated we were going to have to try to identify each and every type of expense, lost revenue, that sort of thing and on a line item by line item approach in order to submit claims to the insurance company that they would accept.

Q Okay, Mr. Parham, I want to show you a document captioned methodology for computing the cost of business interruption which has previously been admitted in evidence as plaintiff's exhibit 66 and ask you if you recognize that?

A Yes, sir, I do. I wrote this.

Q You wrote it?

A This memorandum.

Q What was its purpose, sir?

A The purpose was as I mentioned a moment ago to begin the document and approach if you would methodology to assemble the information necessary to submit claims to the insurance company and as you see if you read through this, it

STONEWALL. Conversation, pleasantries, but—STONEWALL.

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was very detailed in the sense that there were a number of specific line items mentioned and we thought it necessary at that point based on the suggestions of the insurance company and its representative to go through and try to quantify each and every one of the items to submit a claim.

Q Did you ever meet with any representative of the insurance company to determine whether their line item approach was what the insurance company wanted?

A Together with several other people from my firm, Ernst and Whinney and several management people at Cotton Brothers. I say several, I think it was just Mr. Raybourn. We met with Mr. Mike Driscoll of the Madison Driscoll firm of Alexandria I think sometime in late March of 1981 and we viewed this methodology.

Q *With Mr. Driscoll, was it your impression or your understanding of what Mr. Driscoll's feelings were?*

A *Well, before any work was done of a significant nature before investing a lot of time, we wanted to make sure that the approach that Mr. Raybourn had originally thought necessary was going to be acceptable to the insurance company. We didn't want to spend a lot of time doing something that would have to be redone so we reviewed the contents of this document with Mr. Driscoll at that point.*

Q *And what is anything did he indicate regarding this document?*

A *He indicated that a line item approach would be necessary in order to submit a claim.*

He made some suggestions about some of the things in this document as well.

Q You remember any of the specifics of that?

A Not really.

Q If, Mr. Parham, at the time you prepared this, did you expect that the methodology outlined in this document would be able to account for all of the actual losses sustained by Cotton Brothers as a result of this business interruption?

A Well, I guess early on I had hoped that such a formulation such methodology would but it became obvious fairly soon there was just no way that an approach like this coud gather

Receiving no advice or direction from the IRI team, the Cotton team was forced to proceed, relying solely on its auditing expertise and the IRI policy. The Cotton auditors were intimately familiar with the Cotton bakery operation and they knew that the business was a single bakery business owned and operated by Cotton Bros., Inc. They also became aware that the books and records of the Alexandria subsidiary could not serve as a basis for interruption of business claims as described in the October 1, 1980 policy. Faced with a policy offering only the books and records of the Alexandria bakery subsidiary as a basis for a reduction of gross earnings loss, how could they possibly draft a methodology or a proof of loss as described in Schedule IA and IIA of the policy? However, had Cotton Bros., Inc. been included as a named insured, it is probable that the Cotton team could have drafted an appropriate methodology under which interruption of business claims by Cotton Bros., Inc. could be determined. The policy, as written and without including Cotton Bros., Inc. as a named Insured, rendered this probability an impossibility. Receiving no advice or instruction from IRI or the IRI team, the Cotton team began its labors to draft a methodology containing no items relating to reduction of gross earnings. In fact, earnings. the very risk being insured, is not even mentioned—only "line items" directly connected with the fire. Finally, on May 8, 1981, (here we quote the IRI brief)

> "The Cotton team delivered to Driscoll the final draft of a document which they had developed entitled:

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all the costs and all the lost revenue that the company was experiencing.

Q First you thought it could and later you decided it could not?

A Yes, sir, due to my lack of prior business interruption experience at that point I though maybe we could capture all the information we needed but it was impossible once we got into it in more detail. (emphasis ours)

> "Methodology for Computing the Cost of Business Interruption". The approach had been developed by Raybourn and the Cotton team and *Driscoll felt that the approach was proper. He did not make or suggest changes in the metodology.* [*sic*] *His roll* [*sic*] *was to audit Cotton's claims submissions which would follow, in order to review and then discuss with the Cotton team any accounting problems, prior to expected meetings between Cotton and IRI. He was not asked by IRI to and did not calculate the loss.*" (emphasis ours and citations to transcript omitted)

Could there be a more precise, a more deliberate strategy of concealment, of bad faith?

Although IRI chose experts eminently qualified in the field of interruption of business insurance, it deliberately instructed them to make no use of that expertise. IRI deliberately instructed its experts to remain silent and to make no corrections and give no advice on the methodology employed in the drafting of an interruption of business claim—just audit no matter how inappropriate the methodology may be. The STONEWALL strategy was instructed by IRI and examination of the methodology and the proofs of loss submitted by the Cotton team disclosed no items which fit Driscoll's definition of an interruption of business claim. See paragraph 23, infra. Yet, when Cotton's methodology was presented to Driscoll on May 8, 1981, "*Driscoll felt that the approach was proper.*" Driscoll, mindful of IRI's instructions, said nothing; made no correction or suggestion. We find that IRI's instruction, in conjunction with its failure to make Cotton Bros., Inc. a named insured, was intended to induce error by Cotton. The instruction was made for the illicit purpose of inhibiting and defeating Cotton's right to file any claim for earnings damages under Sections IA and IIA of the policy. The stonewall position of IRI was arbitrary, capricious, in bad faith and without probable cause.

23. IRI has contended and continues to contend through this entire proceeding that the only damages available to plaintiffs under the policy are "line by line" or "line items" directly connected with the fire. This contention simply crystalizes in a different form IRI's determination to deny Cotton's right to earnings damages. It defies the clear and concise language of Sections IA and IIA. See paragraph 29, infra. It defies the definition supplied by IRI's own expert Driscoll, who testified:

> "Well, basically when you are looking at a business interruption loss you are confined or you are more interested in the profit and loss section of a financial statement that would be your sales, your various costs of sales elements . . . . And what you eventually try to do is you try to project just like a company would try to project what they are going to do next year. You try to project what the company would have done for the period of interruption had there been no loss then you compare it to what they actually did do and the different number is the amount of loss."

Yet, through the device of IRI's strategy, Cotton has been induced to make claims limited to so-called line items and has been deprived of the right to make a claim under the principal risk insured by the policy. IRI knew and knows that its Form E policy is entitled BUSINESS INTERRUPTION GROSS EARNINGS FORM. The form provides for two types of damages: 1) reduction of gross earnings during the period of interruption as described in Section IA and Section IIA of the policy and by the quote of Michael Driscoll referred to above, and 2) expenses related to reducing loss as described in Section III. If the damages recoverable under Sections IA and IIA are in law a determination of reduction of gross earnings during the period of interruption, then IRI has paid no reduction of gross earnings damages. Not one item paid under the proofs of loss can satisfy Driscoll's

definition of that type of damage. When asked about Raybourn's line by line methodology for the determination of interruption of business losses, Driscoll stated:

> "I don't know what the—where the term line by line came from. The method is not referred to the methodology and first preparation of the claim which was in three segments by Cotton Brothers is now regarding or referred to as line by line and that is basically in his method. I assume it must have been his terminology, certainly was not mine."

The fact that certain witnesses such as Gene Cotton and Raybourn might have testified that items in the proofs of loss were Section IA and IIA damages must be attributed to their lack of knowledge and experience and to the misguidance or lack of guidance induced by the strategy adopted in bad faith by IRI as described in paragraphs 21 and 22 above. A policy restricting damages to line item claims is an extra expense policy. We have found previously that Cotton, on the advice of IRI, rejected extra expense coverage in favor of interruption of business coverage. See paragraphs 5 and 6, supra. IRI, in absolute defiance of Sections IA and IIA, has restricted damages to those afforded by an extra expense policy. This is yet another example of IRI's arbitrary, capricious and bad faith attempt to deny, without probable cause, Cotton's right to earnings damages as provided in Sections IA and IIA.

24. The February 13, 1981 fire brought extreme financial strain on Cotton's bakery operation. Lack of sufficient cash flow and of sufficient funds to pay Baker Perkins for the replacement equipment, made replacement contingent upon IRI's payments under the fire policy. This is why it was necessary for Cotton to secure IRI's agreement to Cotton's choice of the accelerated contract for the replacement of the oven and proofer for the sum of $1,354,820.00. IRI agreed to that choice and

IRI's adjuster, Jarratt, drafted and presented to Cotton a proof of loss in the amount of $1,354,820.00 as payment *under the fire policy* for the loss of the oven and the proofer. Gene Cotton signed and accepted this proof of loss on March 6th and returned it to IRI for payment. Based on IRI's commitment, and thinking that full payment was assured, Gene Cotton, on that very afternoon, called Baker Perkins by telephone and accepted the $1,354,820.00 replacement contract. Cotton was committed. IRI then refused payment. Now Cotton was compromised. Cotton had exercised extrordinary diligence in its efforts to rebuild and restore in the shortest time as possible to the evident benefit of both IRI and itself. It had been successful in securing the contractor most capable of doing a competent job in the shortest time possible. It had settled its claim against IRI for the loss of the proofer and the oven for a sum proposed by IRI's own agent. IRI now refused to pay. Incredible!

Cotton vigorously protested that the proof of loss presented by Jarratt on behalf of IRI became an enforceable contract settling the claim when accepted on March 6, 1981 by Gene Cotton. But IRI, possessor of the money, was prosecutor, judge and jury. Cotton had no means of enforcing its enforceable contract. It could not sue. Time was of the essence. As IRI well knew the destruction of the oven and proofer was a loss insured under the fire policy, not the interruption of business policy, and Jarratt's proposal, as it should, agreed to pay Cotton the exact cost (agreed to by IRI) of replacing that equipment. From his previous conversations and negotiations with IRI, Cotton was well aware of the conditions under which IRI would agree to restore the payment originally proposed by Jarratt. Cotton was forced to accept payment of $1,030,085.00, $234,735.00 less than originally offered by Jarratt (IRI), for the loss under the fire policy. This is the cost suggested by Baker Perkins under its repair proposal, which was lowest of the three proposals sub-

mitted by Baker Perkin and, as we have previously found, was not a firm proposal or a viable alternative.

IRI had a vital interest in the accelerated contract. That contract advanced the termination of the period of interruption from June 1, 1982 to September 21, 1981. IRI suggests that, at the gratuitous request of Cotton's attorney, Alexius, it had gratiously advanced $324,735.00 as expediting expense to be repaid to IRI if Baker Perkins failed to perform the accelerated contract timely. IRI calls it Cotton's gamble. We find that IRI advanced nothing. Viewed with its contemporanous refusal to pay the full amount of the March 6, 1981 proof of loss, we call it a strong-arm attempt by IRI to shift to Cotton the entire risk of Baker Perkins possible failure to perform.

The first paragraph of the proposal letter of Alexius referred to by IRI is as follows: [7]

> "Pursuant to our several conversations, Cotton Bros. Baking Company, Inc., is willing to propose a solution to the adjustment problems which have arisen since IRI rejected the proofs of loss prepared by GAB and submitted by Mr. Cotton on March 6, 1981. *You are advised, however, that our proposition is made in a spirit of compromise only, and is not to be considered a derrogation [sic] from our prior position that an enforceable contract of settlement matured when Mr. Cotton accepted your March 6, 1981, proposal.*" (emphasis ours)

We find that IRI's actions as set forth above were deliberate, arbitrary, capricious, in absolute bad faith and without probable cause.

25. In a slightly similar situation the Cotton team had claimed on its September, 1981 proof of loss the sum of $182,655.00, as cost of the cascade, a piece of equipment used to in-load the proofer. IRI paid that item. Later

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[7] Exhibit P-137, IRI's Exhibit No. 1.17.2.

IRI, characterizing this piece of equipment as "expediting expense", reduced their later payment to Cotton by this amount. Although the purchase of this equipment expedited nothing, we find that Cotton had agreed to pay for that item and to its characterization as "expediting expense" as a vehicle to repay IRI. IRI was entitled to reimburse itself for the $182,655.00 that it had paid by this arrangement with Cotton.

26. In Civil Action No. 83-3237, entitled Baker Perkins, Inc. v. Cotton Bros., Inc., the latter cross-claimed for damages including loss of gross earnings damages and received a jury award of $1,342,624.00. The entire jury award consisted of loss of gross earnings suffered by Cotton Bros. Inc. from the projected date of completion of Baker Perkins' accelerated contract, September 21, 1981, to May 8, 1982.

CONCLUSIONS OF LAW

27. As we have shown previously, it has been the intention of Cotton and IRI since 1970 to give the Cotton bakery operation full insurance protection and coverage against the risk of loss or reduction of gross earnings as defined in the policy during any period of interruption of business as defined in the policy. This is what the parties intended and this is what the policy was designed to accomplish.

The Cotton bakery operation in 1970 consisted of four separate corporations, each of which owned and operated their separate bakery businesses just as they had done prior to the acquisition by the Cottons. There was no interdependency among them. They operated in competition with each other. Thus, although they were owned by Cotton, they were separate and independent bakery businesses and it followed from this that the books and records of each would reflect accurately the increase or decrease in gross earnings for specific periods of time.

Cotton's bakery operation was effectively insured by making the individual bakery corporations named insureds and this coverage continued to be effective as long as the bakery business of each of these companies continued to be operated independently, separately and in competition with each other.

However after the reorganization of 1976, there was but one Cotton bakery business and that one business was owned, controlled and operated on a day to day basis by Cotton Brothers, Inc. Thus Cotton Brothers, Inc. was the sole indispensable named insured in any policy designed to give interruption of business coverage to the Cotton bakery business.

Under Louisiana law, an insurance policy may be reformed after proof that it does not express the actual contract intended by the parties due to mutual error or mistake. *Kolmaister v. Connecticut General Life Insurance Co.*, 370 S.2d 630 (La. App. 4th Cir. 1979), writ denied, 373 So.2d 531 (La. 1979). See *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265 (5th Cir. 1987). Where, as here, the mutual mistake concerns identity of the named insured and destroys coverage on the risk actually assumed by the insurer, the insurer is estopped to deny its liability even in the absence of reformation and estopped from opposing reformation of its policy to cover such risks incurred by the party at interest. *Bonadona v. Guccione*, 362 So.2d 740 (La. 1978); *Fontenot v. American Fidelity Fire Ins. Co.*, 386 So.2d 165 (La. App. 3d Cir. 1980).

It is our conclusion that, through the mutual mistake of Cotton and IRI, Cotton Bros., Inc. was not included as a named insured in the policy issued in 1976; that the renewal of that policy on October 1, 1980 perpetuated the error; that neither Cotton nor IRI intended in 1976 or 1980 to reduce the full interruption of business coverage afforded previously by the four separate interruption

of business policies and that the policy issued October 1, 1980 should be reformed so as to include Cotton Bros., Inc. as a named insured effective October 1, 1980.

28. We have found that Cotton exercised due diligence and dispatch to rebuild, repair or replace, at the earliest date possible, as required by the policy, the property and equipment destroyed in the fire of February 13, 1981 and that production equal to the February 13, 1981 production was achieved on May 8, 1982. We conclude therefore that the period of interruption extended from February 13, 1981 to May 8, 1982, inclusive.

29. IRI drafted its October 1, 1980 renewal policy on an IRI Form E entitled "BUSINESS INTERRUPTION *GROSS EARNINGS FORM* FOR MANUFACTURING OR MERCANTILE OPERATIONS" (emphasis ours). The policy provides for two types of damages: 1) reduction of gross earnings as provided in Section IA and IIA, and 2) expenses related to reducing loss as provided in Section IIIA. We shall not discuss the latter type because there is no dispute regarding IRI's payment of Section III claims. Reduction of gross earnings are described in the policy as follows:

SECTION I

A. Recovery in the event of loss hereunder shall be the ACTUAL LOSS SUSTAINED by the Insured resulting directly from such interruption of business, but not exceeding the reduction in gross earnings less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such described property as has been damaged or destroyed, commencing with the date of such damage or destruction and not limited by the date of expiration of this Policy. Due considera-

tion shall be given to the continuation of normal charges and expenses, including payroll expense, to the extent necessary to resume operations of the Insured with the same quality of service which existed immediately preceding the loss.

SECTION II

A. GROSS EARNINGS—For the purpose of this insurance "gross earnings" are defined as the sum of:

1. total net sales value of production (manufacturing operations),

2. total net sales of merchandise (mercantile operations), and

3. other earnings derived from operations of the business, less the cost of:

4. raw stock from which such production is derived,

5. supplies consisting of materials consumed directly in the conversion of such raw stock into finished stock or in supplying the service(s) sold by the Insured,

6. merchandise sold, including packaging materials therefor, and

7. service(s) from outsiders (not employees of the Insured) for resale which do not continue under contract.

No other costs shall be deducted in determining gross earnings. *In determining gross earnings due consideration shall be given to the experience of the business before the date of damage or destruction and the probable experience thereafter had no loss occurred.* (emphasis ours)

The purpose of the damages provided in Sections I and II above are described by Driscoll, as we have previously quoted: "you try to project what the company would have done for the period of interruption had there been no loss then you compare it to what they actually did do and the different number is the amount of loss." The policy language above "sets forth the formula for calculating the amount actually lost by an insured when business is interrupted, and allows the business to remain in the same financial condition as before the loss." *United Land Investors, Inc. v. Northern Insurance Co. of America*, 476 So.2d 432 (La. App. 2d Cir. 1985). *See also Cora Pub, Inc. v. Continental Casualty Co.*, 619 F.2d 48 (5th Cir. 1980).

The formula for calculating the insured's loss is in terms of reduction of gross earnings, as quoted verbatim above from the policy, and is "unambiguous and constitute[s] the law between the contracting parties." *United Land Investors, supra* at 436 (citing *Rogers v. American Ins. Co.*, 338 F.2d 240 (8th Cir. 1964); *Associated Photographers v. Aetna Casualty and Surety Co.*, 677 F.2d 1251 (8th Cir. 1982); *Eastern Associated Coal Corp. v. Aetna Casualty and Surety Co.*, 642 F.2d 1068 (3d Cir. 1980)).

A 'projection' of earnings is an accepted method of calculating business interruption loss. *See Associated Photographers, supra.* Indeed, the policy language approves, if not requires, the use of 'projected' earnings:

> In determining gross earnings due consideration *shall* be given to the experience of the business before the date of damage or destruction *and* the *probable* experience thereafter had no loss occurred. (emphasis ours)

Accordingly, we hold that the projections presented by plaintiff of its business interruption losses conform to the terms of the policy.

Cotton has submitted for our consideration three projections as a basis for its claim of reduction of gross earnings damages.

Lost earnings need only be proved to a reasonable certainty. *See Borden, Inc. v. Howard Trucking Co.*, 454 So.2d 1081 (La. 1983). The law does not require mathematical precision or absolute exactness in determining the amount of lost earnings: "the trier of fact must be afforded much discretion in the determination of such damages where the evidence clearly shows that damage is proven but not capable of proof to a mathematical or legal certainty." *Rosenblath v. Louisiana Bank & Trust Co.* 432 So.2d 285, 290 (La. App. 2d Cir. 1983). *See Palmer v. Connecticut Railway & Lighting Co.*, 311 U.S. 544, 561, 61 S.Ct. 379, 85 L.Ed. 336, 343 (1941) ("Certainty as to the amount goes no further than to require the basis for a reasoned conclusion.") Accordingly, where it is not possible to state or prove a perfect measure of lost earnings, "courts have reasonable discretion to assess damages based upon all the facts and circumstances of the case." *Tide Craft, Inc. v. Red Ball Oxygen Co.*, 514 So.2d 664 (La. App. 2d Cir. 1987), writ denied, 516 So.2d 135-36 (La. 1987). *See Roshong v. Travelers Ins. Co.*, 281 So.2d 785, 789 (La. App. 3d Cir. 1973).

Among the three projections presented by Cotton at the trial, labelled the "yellow", "blue", and "gray" projections, we consider the blue projection of $4,498,000.00 on lost income for the period February 14, 1981 through May 8, 1982, as the best calculation of damages.

Our reasons for choosing the blue projection are straightforward.

The "blue" projection was prepared by Parham of Ernst & Whinney using the "least squares method" to forecast earning through the interruption period. Parham used the audited financial statements of the parent Cotton Bros., Inc. for the years 1976 through 1980, less

non-recurring expenses, and with "historical data points", calculated a "regression analysis projection". The projected earnings were then subtracted from the actual earnings. The blue projection corresponds exactly to the method set forth in the policy and attested to by Driscoll (par. 23, supra).

The "gray" projection, also prepared by Parham, freezes Cotton's 1980 earnings and simply projects the 1980 earnings without assuming any increase (or decrease). On the other hand, the blue projection is based precisely on the years (1976-1980) before the fire when Cotton operated as a single bakery operation following its reorganization.

The "yellow" projection, although prepared before the fire, was prepared by Cotton management, not by an independent CPA or auditor. Further, this 'internal' projection is based only on the years 1978-1980 and uses, instead of actual income, a formula of "converting pounds produced to sales". Also, because Cotton prepared the yellow projection to support an application for a large bank loan, it is, more probably than not, too optimistic.

IRI objects to the use of Cotton's projections, citing *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981), *on petition for rehearing*, 662 F.2d 1156 (5th Cir. 1981). *Wilkins* warns that statistical evidence "must be employed with great care" even if such evidence is the "best, if not the only, means" of proof available. *Wilkins*, *supra* at 403. In particular, IRI complains that Cotton's projections fail to account for Cotton's loss of a major contract with Winn-Dixie, for a labor strike and for the effects of a recession. *Cf. Wilkins*, *supra* at 402. However, these events occurred after the period of business interruption ended, May 8, 1982.

We conclude therefore that Cotton is entitled to $4,498,000.00 as damages under Sections IA and IIA of

the policy, with interest as set forth in paragraph 33, infra.

30. IRI made the following payments under the policy:

3-23-81	$ 162,367.50
9-15-81	$1,425,289.35
1-29-82	$ 912,250.32
12-22-82	$1,053,276.00
4-4-83	$ 32,578.80
	$3,585,761.97

The issue of what part of these payments if any should be considered earnings damages under Sections IA and IIA has not been addressed by the parties. Obviously, since only reduction of earnings damages are in contest, only reduction of earnings damages paid by IRI should be credited against IRI's reduction of earnings liability. We cannot determine from the record what proofs of loss were paid or rejected by IRI or the grounds upon which such actions were taken. Nor can we determine which categories of claimed losses properly belong under Section III and which have been allocated to Sections IA and IIA.[8] This compels the conclusion that IRI is entitled to no credit whatsoever for payment of earnings damages. This conclusion, though eminently rational, offends equity. It is certainly possibly that IRI paid certain cost items which do not fit the definitions of Sections

[8] We find that the record, though vast, is not sufficient in detail for us to determine the basis on which items of the proofs of loss were paid or rejected by IRI. We have determined however that there are no items related to reduction of gross earnings as described in Sections IA and IIA so that none of the cost items recognized and paid by IRI fit the description in the policy on the definition of its expert, Driscoll. Therefore, as a matter of right, IRI is not entitled to credit for the payment of any IA and IIA damages whatever. However, in its trial memorandum filed September 30, 1986 (page 3) IRI declares that $427,460.67 of the funds paid by it to Cotton represent payment for claims for reduction of gross earnings less non-continuing charges and expenses.

IA and IIA or Section III but which in some way involved or affected earnings. IRI itself has stated, without explanation, that it paid $427,460.67 in earnings damages and $3,158,302.10 [sic] in "extra expenses". As we have declared previously, we cannot verify the accuracy of this allocation. We do know that IRI paid $3,585,761.97 in total damages, and that they state that $3,158,302.10 of that amount was Section III damages. The remaining $427,460.67 in cost items cannot be classified legally as earnings damages as defined by the policy. Nevertheless the $427,460.67 was accepted by Cotton and we hold in equity that IRI should receive credit. However, because this credited amount was part of IRI's scheme to restrict Cotton's recovery to line item damages and to deny Cotton any Section IA and IIA damages, IRI's credit shall not be applied until Cotton's total damages plus penalties, interest and attorney's fees have been adjudged.

We recognize that the $182,655.00 (cost of cascade) was rightfully withheld by IRI. That item was withheld with the assent of Cotton as repayment for the cost of the cascade.

31. We have held that IRI is not entitled to the $324,735.00 so-called "expediting expense" because that money belonged to Cotton under the fire policy proof of loss drafted and presented by IRI's Jarratt to Cotton and accepted by Gene Cotton on March 6, 1981. See par. 24, supra. That acceptance made IRI absolutely and unconditionally liable for $1,354,820.00 as payment under the fire policy for the loss of the oven and proofer. Under La.R.S. 22:658, IRI was absolutely and unconditionally obliged to pay the full amount of that accepted proof of loss on or before sixty days from March 6, 1981.

We hold IRI's refusal to pay the full amount of the March 6, 1981 proof of loss drafted and presented by IRI and accepted by Cotton was arbitrary, capricious, in bad faith and without just cause and that Cotton should

have judgment against IRI in the amount of $324,735.00 with penalties and attorney's fees under La.R.S. 22.658 and interest.[9]

32. In Civil Action No. 83-3237, entitled Baker Perkins, Inc. versus Cotton Bros., Inc., the latter cross-claimed for damages, including loss of gross earnings damages, and received a jury award of $1,342,624.00 for loss of gross earnings. Louisiana law is well-settled that an insurer is entitled to be subrogated to the rights of its insured after payment of the latter's claim. La. C.C. art. 1829; *Aetna Insurance Co. v. Naguin*, 488 So.2d 950 (La. 1986); *Joe E. Freund, Inc. v. Insurance Company of North America*, 261 F.Supp. 131 (W.D. La. 1966).

IRI is not entitled to subrogation so long as the IRI policy does not Cotton Bros., Inc. as a named insured. Since we have reformed the policy to make Cotton Bros., Inc. a named insured, and since the entire jury award consisted of earnings damages suffered by Cotton Bros., Inc., IRI is entitled to subrogation and is entitled to credit against the principal award, penalties, attorney's fees and prejudgment interest in favor of Cotton Bros., Inc. in this proceeding.[10]

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[9] We have jurisdiction here. Cotton has specifically contested IRI's reduction of the $1,354,820.00 due Cotton for the fire loss of the oven and proofer on the ground that the mutually executed proof of loss was an enforceable contract settling that claim (see La. R.S. 22:658), reserving all of its rights. We simply have acted on the rights so reserved.

[10] Plaintiff has cited *Fort Motor Credit Co. v. State Farm Mutual Automobile Insurance Co.*, 309 So.2d 914 (La. App. 3d Cir. 1975) and *Powers v. Calvert Fire Insurance Co.*, 216 S.C. 309, 57 S.E.2d 638 (1950) as authority for the contention that subrogation in this proceeding is an equitable doctrine and should not be available to IRI because IRI joined with Baker Perkins, Inc. in contesting the claim of Cotton Bros., Inc. to loss of earnings damages. We hold that those authorities are not pertinent here. IRI has a perfect right to contest plaintiff's claims to such damages as part of its own defense in this proceeding and the equitable doctrine en-

However, IRI is not entitled to subrogation until it has paid to Cotton Bros., Inc. the entire amount of the judgment rendered in this Opinion. Upon such payment by IRI, the jury verdict and judgment for Cotton Bros., Inc. in Civil Action No. 83-3237 shall become the property of IRI. Cotton Bros., Inc. shall make a written legal assignment to IRI upon IRI's request. IRI shall assume the costs (and risks) of collecting the judgment rendered in Civil Action No. 83-3237.

33. Louisiana law governs the award of prejudgment interest, and 28 U.S.C. § 1961 governs the award of post-judgment interest in this case. *Nissho-wai Co. v. Occidental Crude Sales, Inc.*, 848 F.2d 613 (5th Cir. 1988).

Under Lauisiana law, legal interest is due "at least from date of judicial demand on a claim for damages arising out of breach of contract, regardless of whether the precise amount of the claim is unliquidated, disputed or not ascertainable with certainty at the time suit is filed." *Mini Togs Products, Inc. v. Wallace*, 513 So.2d 867 (La. App. 2d Cir. 1987), writs denied, 515 So.2d 447 (La. 1987). *See also, Smith v. State Farm Fire and Casualty Co.*, 695 F.2d 202 (5th Cir. 1983) (interest on penalty and fee awards under LSA-R.S. 22:658 also commences from date of judicial demand).

Accordingly, plaintiffs shall receive legal interest from the date suit was filed in accordance with La. C.C. art. 2924, and from date of judgment in accordance with 28 U.S.C. § 1961 on the entire amount of the judgment rendered in this Opinion.

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nunciated in plaintiff's authorities cannot be interpreted to deprive IRI of that right.

It is possible, despite the American rule, that IRI's subrogation should be reduced by reasonable attorney's fees expended by Cotton in its suit against Baker Perkins. Because of the attorney's fees awarded under LSA-R.S. 22:658, we refuse to do so. See para. 34, infra.

34. LSA-R.S. 22:658 provides that insurers who arbitrarily, capriciously, or without probable cause fail to pay any claim within sixty days of proof of loss [11] are liable for the amount of the loss as well as a penalty of 12% of "the total amount of the loss" and all reasonable attorney's fees "for the prosecution and collection of such loss." If the insurer has made a "partial payment", the penalty is 12% of the difference between the amount tendered and the amount actually owed. LSA-R.S. 22:658. *See Fuqua v. Aetna Casualty & Surety Co.*, 542 So.2d 1129 (La.App. 3d Cir. 1989).

Whether an insurer's failure or refusal to pay its arbitrary, capricious or without probable cause within the meaning of the statute is a question of fact to be determined in light of the facts and circumstances of the particular case. *Smith v. State Farm Fire and Casualty Co.*, 695 F.2d 202, 205 (5th Cir. 1983) (citations omitted). In particular, it is a determination that "depends primarily on the facts known to the insurer at the time of its actions." *Scott v. Insurance Co. of America*, 485 So.2d 50, 52 (La. 1986). "The words arbitrary and capricious . . . do not necessarily imply an opprobrious connotation." *Steadman v. Pearl Assurance Co.*, 167 So.2d 527, 531 (La. App. 4th Cir. 1964). Rather, arbitrary conduct merely "implies an abuse of one's authority or power." *Id.* Further, the fact that an insurer mis-reads or misinterprets the clear and unambiguous provisions of its own policy does not relieve the insurer of liability under LSA-R.S. 22:658. *Fidelity & Casualty Co. of N. Y. v. Superior Casing Crews, Inc.*, 642 F.2d 147, 150 (5th Cir. 1981). The insurer, not the insured, takes the risk of misinterpreting its own policy provisions. *Marks v. Trinity Universal Insurance Co.*, 531 So.2d 516 (La.

[11] A 'satisfactory proof of loss' for purposes of LSA-R.S. 22:658 is that which provides the insurer with sufficient facts to apprise the insurer of the insured's claim or to acquire knowledge of the insured's loss. *See Hart v. Allstate Insurance Co.*, 437 So.2d 823 (La. 1983).

App. 2d Cir. 1988). Insurers are "charged with knowledge of their policy's contents." *Carney v. American Fire & Indemnity Co.*, 371 So.2d 815 (La. 1979). Accordingly, an insurer may be deemed arbitrary and capricious for failing to properly assess and pay damages which fully compensate the insured, where the policy requires that the insured be fully compensated. *Higginbotham v. New Hampshire Indemnity Co.*, 498 So.2d 1149 (La. App. 3d Cir. 1986).

The facts of this case are distinctive. The stonewall position undertaken by IRI, which conduct we find as arbitrary, capricious, in absolute bad faith and without probable cause, precluded Cotton from submitting a proof of loss that would have compensated Cotton as provided for by IRI's policy. To this very day, IRI resists any claims calculated according to Sections IA and IIA of its policy. This conduct is an absolute abuse of IRI's 'power' and position as ultimate arbiter of what losses are properly payable under its policy provisions. IRI's conduct goes beyond mere breach of contract. It offends acceptable notions of business ethics.

IRI's refusal to assist Cotton in calculating claims properly payable to Cotton under the policy constitutes precisely the conduct which Louisiana law proscribes. An insurer must timely pay what is due the insured. IRI has never even deigned to consider what is properly due Cotton and certainly there can be no doubt that IRI knew that Cotton was entitled to interruption of business (earnings) damages.

Accordingly, IRI is liable for the statutory penalty of 12% on the $4,498,000.00 in earnings not paid under IRI's business interruption policy and $324,735.00 not paid under IRI's property damage (fire) policy and for the attorney's fees [12] incurred by Cotton in prosecuting

[12] The decision on the merits is a "final decision" for purposes of appeal as a matter of law under 28 U.S.C. § 1291 even though the

its claim against IRI, with interest on the whole as set forth in paragraph 33.

CONCLUSION

35. IRI issued an interruption of business policy in favor of the three (really all five) subsidiary bakeries as named insureds and intended to cover the Cotton bakery business. All parties admit that the fire of February 13, 1981 was an occurrence in the contemplation of the policy and that it took place on the prroperty of a named insured, the Alexandria subsidiary. Indeed IRI has paid substantial Section IIIA damages under the policy. The primary purpose of the policy was to protect Cotton's income, i.e. the possible reduction of gross earnings which might be suffered by the Cotton bakery business during the period required to restore production as it existed on the date of the fire (interruption of business damages under the provisions of Sections IA and IIA). As we have seen, not one item of damage paid by IRI fits the definition of interruption of business (reduction of earnings) damages as defined by its own expert or by its policy. IRI has not paid one cent in earnings damages. It follows that if the fire had occurred at the Shreveport,

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amount of attorney's fees for the litigation remains to be determined. *Budinich v. Becton Dickinson and Co.*, 486 U.S. ——, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988).

The parties may stipulate by compromise the amount of attorney's fees. If they have not done so prior to September 10, 1989, Cotton Brothers Baking Company, Inc. and Cotton Bros., Inc. shall file on or before October 10, 1989 a motion to set attorney's fees, including fees for the filing and submission of this motion and also projected or suggested fees for answering and trial of appeal if any. Plaintiffs should file with their said motion all bills submitted and paid and all supporting documentary evidence along with appropriate authorities and suggested findings of fact and conclusions of law. Local Rule 20.16 of the Western District of Louisiana. IRI may file opposition on or before November 10, 1989 accompanied by any supporting documentary evidence, authorities and suggested findings of fact and conclusions of law.

Monroe, Natchez or Baton Rouge plant, under IRI's interpretation of the policy and under its strategy, it would have been liable for the same amount of interruption of business damages—none. Following IRI's interpretation and strategy to its logical conclusion, IRI, under its $39,000,000.00 interruption of business policy was obliged to pay no interruption of business damages. The interruption of business risk was solely the risk of Cotton Bros., Inc. IRI cannot be allowed to avoid all business interruption (earnings) damages, simply because of its own failure to include Cotton Bros., Inc. as a named insured in the policy. We have determined that IRI's contentions are not persuasive.

We conclude therefore, that as a matter of law:

That the interruption of business insurance policy number 31815935 issued October 1, 1980 by Industrial Risk Insurers in favor of Cotton Brothers Baking Company, Inc., et al should be reformed so as to make and include Cotton Bros., Inc. as a named insured effective October 1, 1980; that

There should be judgment in favor of Cotton Brothers Baking Company, Inc. and Cotton Brothers, Inc. and against Industrial Risk Insurers in the amount of $324,735.00 plus penalties and attorney's fees under LSA-R.S. 22:658 with pre-judgment interest from January 12, 1983 in accordance with Louisiana Civil Code article 2924 and post-judgment interest thereon in accordance with 28 U.S.C. § 1961; that

There should be judgment herein in favor of Cotton Brothers, Inc. and against Industrial Risk Insurers in the amount of $4,498,000.00 plus penalties and reasonable attorney's fees under LSA-R.S. 22:658 with pre-judgment interest thereon from January 12, 1983 in accordance with Louisiana Civil Code article 2924 and post-judgment interest in accordance with 28 U.S.C. § 1961, less a credit against this total amount allowed and decreed

in equity in favor of Industrial Risk Insurers in the amount of $427,460.67;

That, upon payment by Industrial Risk Insurers to Cotton Bros., Inc. of the entire amount (less credit) awarded in the preceding paragraph, Industrial Risk Insurers shall be subrogated to all rights, title and interest of Cotton Bros., Inc. in and to Civil Action No. 83-3237 of the United States District Court for the Western District of Louisiana entitled Baker Perkins, Inc. versus Cotton Brothers, Inc. and in accordance with said subrogation and upon request of Industrial Risk Insurers, Cotton Bros., Inc. should execute in favor of Industrial Risk Insurers a valid, legal and written assignment of all its rights, title and interest in Civil Action No. 83-3237 described above.

DONE AND SIGNED at Alexandria, Louisiana, this 31st day of July, 1989.

/s/ Nauman S Scott
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4128

COTTON BROTHERS BAKING COMPANY, INC.,
Plaintiff-Appellee,

versus

INDUSTRIAL RISK INSURERS,
Defendant-Third Party Plaintiff-Appellant,

versus

BAKER PERKINS FOOD MACHINERY, INC.,
Third-Party Defendant-Appellant.

COTTON BROTHERS BAKING COMPANY, INC.,
Plaintiff-Appellee,

versus

BAKER PERKINS, INC.,
Defendant-Appellant.

BAKER PERKINS, INC.,
Plaintiff-Appellant,

versus

COTTON BROTHERS BAKING COMPANY, INC.,
Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Louisiana

SUBSTITUTED OPINION ON REHEARING

(Opinion September 13, 1991, 5th Cir., 1991, —— F.2d ——)
(January 6, 1992)

Before POLITZ, WILLIAMS, and JONES, Circuit Judges.

PER CURIAM:

The opinion of this court dated September 13, 1991, as revised on denial of rehearings dated October 10, 1991, is reported at 941 F.2d 380 (5th Cir. 1991). On November 25, 1991 we *sua sponte* recalled our mandate for further consideration of the applications for rehearing. We now revise and correct our original opinion which, as revised and corrected herein, is reaffirmed and reinstated. Other than as granted herein, the petitions for rehearing are denied. The mandate shall issue forthwith.

The portion of the opinion subtitled "The IRI Litigation," reported at 941 F.2d 385 and enumerated as headnote [2], is deleted and the following is substituted:

> IRI raises three issues on appeal. First it asserts that the trial court erred by not crediting $3,585,761.97 which it had paid under the business interruption policy against the $4,498,000 damages judgment rendered by the district court. IRI contended on appeal that the trial court granted the award to Cotton solely in satisfaction of Section IA of the policy. The record does not support that contention. Section IA notes the insured's rights to receive loss of earnings damages; Section IIA defines such damages and establishes the method of ascertaining such. These sections, in full, provide as follows:

SECTION I

A. Recovery in the event of loss hereunder shall be the ACTUAL LOSS SUSTAINED by the Insured resulting directly from such interruption of business, but not exceeding the reduction in gross earnings less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such described property as has been damaged or destroyed, commencing with the date of such damage or destruction and not limited by the date of expiration of this Policy. Due consideration shall be given and expenses, including payroll expense, to the extent necessary to resume operations of the Insured with the same quality of service which existed immediately preceding the loss.

SECTION II

A. GROSS EARNINGS.—For the purposes of this insurance "gross earnings" are defined as the sum of:

1. total net sales value of production (manufacturing operations),

2. total net sales of merchandise (mercantile operations), and

3. other earnings derived from operations of the business, less the cost of:

4. raw stock from which such production is derived,

5. supplies consisting of materials consumed directly in the conversion of such

raw stock into finished stock or in supplying the service(s) sold by the Insured,

6. merchandising sold, including packaging materials therefor, and

7. service(s) purchased from outsiders (not employees of the Insured) for resale which do not continue under contract.

No other costs shall be deducted in determining gross earnings. *In determining gross earnings due consideration shall be given to the experience of the business before the date of damage or destruction and the probable experience thereafter had no loss occurred.* (Emphasis ours.)

Michael Driscoll was IRI's lead expert on interruption of business insurance. He headed the IRI committee empowered to approve or reject proofs of loss for such insurance claims. When asked how interruption of business claims should be determined he testified: "You try to project what the company would have done for the period of interruption had there been no loss, then you compare it to what they actually did do and the different number is the amount of the loss." When Cotton's auditors sought instructions from Driscoll on the committee's requirements for the payment of these proofs of loss, Driscoll directed a "line item" procedure which is appropriate only for claims under Section III of the policy. Section III only indirectly relates to damages. Under the policy Cotton was obligated to mitigate damages. Section III entitled Cotton to repayment for each item of expense it incurred in its efforts to mitigate damages during the 15 months in which its business was interrupted. Section III provides in pertinent part:

SECTION III

A. EXPENSES RELATED TO REDUCING LOSS. —This Policy also covers:

1. such expenses as are necessarily incurred for the purpose of reducing loss under this Policy (except expense incurred to extinguish a fire), and

2. such expenses, in excess of normal, as would necessarily be incurred in replacing any finished stock used by the Insured to reduce loss under this Policy. . . .

As instructed, the claims were presented to IRI's committee using the line item procedure and payments of $3,585,761.97 were made.

This issue is brought into proper perspective when we focus on the purpose of this insurance—to protect Cotton from losses caused by business interruption, including loss of earnings and additional expenses incurred in an effort to stay in business. As a result, however, of tactics described by the district court as "stonewalling," which we discuss in the subsection on statutory penalties reported at 941 F.2d 386-87 and enumerated as headnote [4], Cotton did not make the computations detailed in Section IIA. No proofs of loss of such damages were ever invited or submitted and none were paid. The record is devoid of acceptable evidence showing that IRI made any payments whatever for business interruption losses. In this settling, we must reject IRI's contention that it is entitled as a matter of law to a credit against the damages award for the payment of the $3,585,761.97, other than the credit for the $427,460.67 allowed in equity by the district court.

The last two paragraphs of that portion of the opinion subtitled "Statutory Penalties," reported at 941 F.2d

387 and enumerated as headnote [5], is deleted and the following is substituted:

> We reject the IRI contention that the district court erred in assessing statutory penalties on the entire $4,498,000 (less $427,460,67) which it awarded Cotton Brothers on the business interruption policy, as well as on the $324,735 awarded on the fire policy. We perceive no error therein.

The first paragraph of that portion of the opinion subtitled "Conclusion," reported at 942 F.2d 932, is deleted and we substitute the following:

> IRI's assignments of error are rejected.

Finally, we delete paragraph 1 of footnote 15, reported at 941 F.2d 392, and substitute the following:

> 1. Cotton Bros. v. IRI. Affirmed in the amounts of $324,735 and $4,498,000 (less a credit of $427,460.67) plus statutory penalties under La. R.S. 22:658, and prejudgment interest from January 12, 1983 to date of judgment under Louisiana Civil Code article 2924 and post-judgment interest as provided by 28 U.S.C. § 1961. Upon issuance of our mandate the district court may award appropriate attorney's fees as discussed in this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4128

COTTON BROTHERS BAKING COMPANY, INC.,
Plaintiff-Appellee,

versus

INDUSTRIAL RISK INSURERS,
Defendant-Third Party Plaintiff Appellant,

versus

BAKER PERKINS FOOD MACHINERY, INC.,
Third Party Defendant-Appellant.

COTTON BROTHERS BAKING COMPANY, INC.,
Plaintiff-Appellee,

versus

BAKER PERKINS, INC.,
Defendant-Appellant.

BAKER PERKINS, INC.,
Plaintiff-Appellant,

versus

COTTON BROTHERS BAKING COMPANY, INC.,
Defendant-Appellee.

ORDER

[Filed Mar. 6, 1992]

Appeals from the United States District Court
for the Western District of Louisiana

Before POLITZ, WILLIAMS and JONES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellant Industrial Risk Insurers' to recall mandate in the referenced cause is DENIED.

/s/ HAP
2/18/92

/s/ JGW
2-20-92

/s/ ENJ
3/3/92

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-4128

COTTON BROTHERS BAKING COMPANY, INC.,
Plaintiff-Appellee,

v.

INDUSTRIAL RISK INSURERS,
Defendant/Third-Party Plaintiff-Appellant,

v.

BAKER PERKINS FOOD MACHINERY, INC.,
Third-Party Defendant-Appellant.

COTTON BROTHERS BAKING COMPANY, INC.,
Plaintiff-Appellee,

v.

BAKER PERKINS, INC.,
Defendant-Appellant.

BAKER PERKINS, INC.,
Plaintiff-Appellant,

v.

COTTON BROTHERS BAKING COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
Nauman S. Scott, Judge

Oct. 10, 1991

ON PETITIONS FOR REHEARING

(Opinion September 13, 1991, 5th Cir.1991, 941 F.2d 380)

Before POLITZ, WILLIAMS, and JONES, Circuit Judges.

PER CURIAM:

The opinion of this court reported at 941 F.2d 380 (5th Cir.1991), as corrected and revised herein, is reaffirmed and reinstated.

We delete the final paragraph on slip op. page 6144 and substitute:

> The court erred, however, in assessing statutory penalties on the entire $4,498,000 which it awarded Cotton Bros. on the business interruption policy, as well as the $324,735 awarded on the fire policy. Having modified that portion of the judgment to $912,238.03, we affirm the assessment of penalties only as applied to that amount plus the $324,735 fire policy award. In addition, after issuance of the mandate the trial court may award attorney fees, as it deems appropriate, on this aspect of the judgment.

We delete the first numbered paragraph of footnote 15, slip op. page 6151, and substitute:

> 1. Cotton Bros. v. IRI. Modified and rendered in the amount of $912,238.03. Affirmed in the amount of $324,735. The net judgment is thus $1,236,973.03 plus the statutory penalty of 12% ($148,436.76), with prejudgment interest on those amounts dating from January 12, 1983.

As revised, the original opinion is REINSTATED.

Other than the foregoing, the petitions for rehearing filed herein are DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4128

COTTON BROTHERS BAKING COMPANY,
Plaintiff-Appellee,

versus

INDUSTRIAL RISK INSURERS,
Defendant-Third Party Plaintiff-Appellant,

versus

BAKER PERKINS FOOD MACHINERY, INC.,
Third Party Defendant-Appellant.

COTTON BROTHERS BAKING COMPANY,
Plaintiff-Appellee,

versus

BAKER PERKINS, INC.,
Defendant-Appellant.

BAKER PERKINS, INC.,
Plaintiff-Appellant,

versus

COTTON BROTHERS BAKING COMPANY,
Defendant-Appellee.

ORDER

[Filed No. 25. 1991]

Appeals from the United States District Court
for the Western District of Louisiana

ORDER:

The Court hereby recalls its mandate sua sponte issued in the above cause on November 4, 1991 pending further consideration of this case before this Court.

/s/ Henry A. Politz
United States Circuit Judge

(2)

Supreme Court, U.S.
FILED
MAY 7 1992
OFFICE OF THE CLERK

No. 91-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INDUSTRIAL RISK INSURERS,
Petitioner

v.

COTTON BROTHERS BAKING COMPANY, INC.,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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LIST OF PARTIES

Respondent supplements the list of parties submitted by Petitioner to add the following: Cotton Brothers, Inc., Adams T.L. Acquisitions Corporation, the Federal Deposit Insurance Corporation, R. Gene Cotton, W.F. Cotton, W.F. Cotton, Jr., Katherine M. Cotton, Katherine A. Cotton, W.F. Cotton, III, Nancy W. Cotton, Richard Gene Cotton, Jr., William Howard Cotton, Genevieve Tracy Cotton and Baker Perkins, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1614

INDUSTRIAL RISK INSURERS,
Petitioner

v.

COTTON BROTHERS BAKING COMPANY, INC.,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The instant litigation arose out of a fire which destroyed a bakery business in Alexandria, Louisiana on Friday the thirteenth of February, 1981. Following protracted but fruitless negotiations, Cotton Brothers, Inc. ("Cotton"), the owner of the bakery business, filed suit in the United States District Court for the Western District of Louisiana in 1983 against both its insurer, Industrial Risk Insurers ("IRI") and Baker Perkins, Inc., an industrial baking equipment supplier which had contracted to deliver replacement equipment to Cotton within a specified time period. Although Cotton's claim against IRI and its claim against Baker Perkins were tried together, and both are dealt with in the opinion of the appellate court below, the petition for certiorari herein only involves the claim against IRI.

The trial court entered judgment in favor of Cotton and against IRI on July 31, 1989, and supported its decision with a 51-page opinion. Petition Appendix at 25a-72a. IRI prosecuted an appeal, seeking review of three issues decided by the trial court. One of those issues involved the denial of IRI's claim that $3,585,761.97 paid to Cotton under Section III of its policy, "EXPENSES RELATED TO REDUCING LOSS," should be credited against Section I of its policy, which entitles the insured to recover the "ACTUAL LOSS SUSTAINED" from the interruption of the insured's business (hereinafter referred to as "the credit issue"). IRI devoted a substantial portion of the Argument in its appellate brief to the credit issue. That issue was also the principal focus of its oral argument, and its reply brief was almost entirely dedicated to it.

On September 13, 1991, the Fifth Circuit Court of Appeals issued an opinion which modified the holding on the credit issue in IRI's favor, but otherwise affirmed the judgment of the district court. Both Cotton and IRI petitioned for rehearing. On October 10, 1991, the Fifth Circuit issued a second opinion, revising the amount of the net judgment in Cotton's favor. The Fifth Circuit's mandate in the case issued on November 4, 1991, but three weeks thereafter, on November 25, 1991, the court recalled its mandate *sua sponte*. On January 6, 1992, six weeks after the mandate was recalled, a third opinion was rendered which substituted new language on the credit issue, otherwise reaffirmed the prior holdings, and ordered the mandate to issue forthwith.

On January 15, 1992, IRI moved the district court to stay execution of the judgment pending a contemplated motion to the Fifth Circuit to recall its mandate or, alternatively, a petition to this Court for a writ of certiorari. The motion was denied, whereupon IRI petitioned the Fifth Circuit on January 20, 1992 for a writ of mandamus or, in the alternative, for an order staying enforcement of the mandate. This petition was also denied.

On February 3, 1992, IRI applied to Justice Scalia, in his capacity as Circuit Justice for the Fifth Circuit Court of Appeals, for a Stay of Enforcement pending a decision on a petition to this Court for a writ of certiorari. This application presented, in an abbreviated form, the same arguments contained in the pending writ petition, and it was denied. Opposition Appendix at 16a. On February 5, 1992, IRI finally moved the Fifth Circuit to recall its mandate. That motion was accompanied by a proposed Rehearing Petition and Suggestion for Rehearing En Banc, which presented to the Fifth Circuit, virtually *verbatim*, the same arguments made in the writ petition now pending before this Court. Opposition Appendix at 1a. The Fifth Circuit denied the motion to recall the mandate on March 6, 1992. In early April, IRI petitioned this Court for a writ of certiorari.

SUMMARY OF THE ARGUMENT

In its Petition for a Writ of Certiorari, IRI misstates both the law and the facts. IRI cannot point to a single case in which a United States Court of Appeals has affirmatively spoken to the issues IRI raises on appeal, and rejected the position taken by the Fifth Circuit. There simply is no conflict among the circuits. Moreover, everything done by the Fifth Circuit to correct its mistake in this case was within the sound discretion of the court. IRI cannot show an abuse of discretion. Each element of the Fifth Circuit's action is supported by ample precedent.

IRI's claim that it did not have its day in court is disingenuous, to say the least. IRI had *nine years* in court, and was heard on all of the issues, not once but many times.

IRI even goes so far as to ask for the wholly inappropriate remedy of reversal, thus raising questions about the proper scope of the Court's review of the judgment below, and the sufficiency of the record before the Court to entertain a remedy which goes to the merits of the

case. IRI is requesting the Court to overturn a decision on the merits on purely procedural grounds, without the benefit of briefing on the merits—an anomalous request from a party claiming to have been deprived of the chance to be heard.

There is absolutely nothing about this case that makes it a serious candidate for certiorari.

ARGUMENT

IRI promotes itself as the champion of finality: "at some point, there must be an end to litigation. . . ." Petition at 7. Cotton concurs wholeheartedly. This lawsuit began in 1983. IRI lost in the trial court and then in the court of appeals. IRI has briefed all the issues many times. Ironically, it is IRI which is now dragging this litigation into its ninth year.

But the instant writ petition is not about finality, nor is it about due process. IRI's unhappiness really stems from the resolution of the credit issue in Cotton's favor by the courts below. However, after nine years of losing on the merits, IRI apparently realizes that it must try a new strategy. That strategy consists of an attempt "to orbit to a constitutional apogee" an appellate court's prompt recall of a mandate to correct a mistake. *Cf. Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1168 (5th Cir. 1959). Neither the applicable law nor the facts of this case lend support to such an attempt.

I. IRI MISSTATES THE LAW: THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER U.S. COURT OF APPEALS ON THE SAME MATTER.

IRI informs the Court that it cannot find a reported case in which a court of appeals has recalled its mandate to grant a previously denied petition for rehearing, and then argues this shows there is a conflict among the circuits. It should come as no surprise that IRI cannot find a case exactly like this one: mandates are sparingly re-

called, and rehearings are seldom granted. But to establish a conflict among the circuits, IRI must show that at least one other circuit has *affirmatively spoken* on this issue, and has rejected the position taken by the Fifth Circuit. This it cannot do, because the applicable case law confirms that the action taken by the Fifth Circuit here is well within the discretionary power vested in an appellate court.

The authority of a court of appeals to recall its mandate is beyond question, even though there is no explicit provision for recall in the rules. *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988); *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 979 (5th Cir. 1979). The analogy IRI attempts to draw between recall of a mandate and the ability of a district court to relieve a party from a judgment under the authority of Fed. R. Civ. P. 60 may be interesting from a scholarly point of view, but it is not controlling or even persuasive. There are significant differences between trial courts and courts of appeals. A suitor appeals as of right from the errors of a district court; a writ of certiorari is rarely granted by this Court, and then only when there are "special and important reasons therefor." Sup. Ct. R. 10.1. Hence, there is an urgency for a court of appeals to get it right. That is one reason why the "Rules of Civil Procedure apply to procedure in the District Courts, not to the Court of Appeals." *Hines v. Royal Indemnity Co.*, 253 F.2d 111, 113 (6th Cir. 1958) (collecting cases). It is also a reason why the decision to recall a mandate falls within the *discretion* of the court of appeals. *Zipfel*, at 567. That discretionary authority is explicitly recognized in Rule 41.2 of the Fifth Circuit's Local Rules, which acknowledges the appellate court's power to recall its mandate "to prevent injustice."

While it is certainly true, as IRI argues, that the Court's power to recall its mandate should be exercised sparingly, IRI cites no legal authority which directly sup-

ports its position that a mandate cannot be recalled when the members of the panel decide that a mistake has been made.[1] In *Legate v. Maloney*, 348 F.2d 164 (1st Cir. 1965), relied upon by IRI, the court decided it was inappropriate to reconsider its prior opinion *after* the Supreme Court had denied certiorari—a situation very different from the present circumstances. Although the court in *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963 (1st Cir. 1973), stated that "erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment," the First Circuit effectively did recall its mandate in that case to consider whether a subsequently decided Massachusetts state court decision called its earlier ruling into question. The court denied the Motion to Recall the Mandate and the Petition for Rehearing by reaching the merits of the alleged error; the panel then decided that the state court case was not applicable to the circumstances before it, and could not have been applied retroactively even if it had been relevant. In *United States v. Tulare Lake Canal Co.*, 677 F.2d 713 (9th Cir. 1982), the court discussed the considerations pertinent to recall of its prior mandate, but actually decided to again review the issues considered on the earlier appeal under the law of the case doctrine.

IRI acknowledges the Fifth Circuit may have acted to correct an injustice when it recalled the mandate. Petition at 5. Can there be a better reason for the exercise of discretionary authority? The decision whether to recall

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[1] It is wrong to assume, as IRI does, that the Fifth Circuit recalled its mandate because the judges changed their minds. There are other possibilities. For example, there may have been miscommunications between judges, law clerks, or other court personnel. The glaring arithmetical errors in the first reported opinion, noticed immediately by both parties and corrected by the Court in a second opinion on October 10, 1991, may have caused the Court to realize that something was amiss, and that it should take another look at this case.

a mandate falls squarely within the discretion of the court—discretion which the court may exercise for good cause, to prevent injustice, or in special circumstances. *American Iron and Steel Institute v. EPA*, 560 F.2d 589 (9th Cir. 1977). In the instant situation, the court had good cause to recall its November 4, 1991 mandate to prevent injustice to Cotton. The corrected opinion of January 6, 1992 denies IRI the benefit of what the district court held, and the court of appeals affirmed, constituted "stone-walling" tactics employed in bad faith against its insured. Petition Appendix at 77a. Given the nature and extent of IRI's bad faith, the Fifth Circuit acted properly in recalling the mandate once it became concerned that the original opinion was incorrect.

As both the *Powers* case, *supra*, and *United States v. Tulare Lake*, *supra*, demonstrate, courts have revisited the merits when deciding whether to recall a mandate. Courts have also recalled their mandates *sua sponte*. *See, e.g., Martin v. Walk, Haydel & Assoc., Inc.*, 794 F.2d 209, 211 (5th Cir. 1986). Courts have granted petitions for rehearing without requesting a response from other parties. *See, e.g., United States v. Allegheny-Ludlum Indus., Inc.*, 568 F.2d 1073, 1074 (5th Cir. 1978).[2] Courts have caused their mandates to issue "forthwith." *See, e.g., Ostrer v. United States*, 584 F.2d 594, 598 (2nd Cir. 1978); *Johnson v. Bechtel Assoc. Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986). In fact, ample precedent exists for everything which happened in the court below. What does *not* exist is a decision by another U.S. Court of Appeals on the same matter that goes the other way. This case presents no conflict among the circuits which would warrant review by the United States Supreme Court.

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[2] Fed. R. App. P. 40 merely provides that petitions for rehearing will not "ordinarily" be granted in the absence of such a response. Clearly, a decision as to whether this was the "ordinary" case fell within the sound discretion of the appellate court.

II. IRI MISSTATES THE FACTS: THE INSTANT CASE IN NO WAY WARRANTS THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

IRI acknowledges that "[t]o undo a presumed error during the appropriate period is laudable." Petition at 7. It is clear from the substituted opinion that the Fifth Circuit recalled its mandate on November 25, 1991 to do exactly that—to undo an error during the appropriate period—in order to prevent injustice to Cotton. Fifth Circuit Local Rule 41.2. IRI acknowledges that an appellate court has inherent power to recall its mandate in the interest of justice, but argues that the power should not have been exercised here without some exceptional circumstances other than the panel's unanimous conviction, apparent from the substituted opinion, that a mistake had been made and should be corrected.

The Fifth Circuit recalled its mandate only three weeks after it was issued, and reached its revised decision only six weeks later; the time for seeking Supreme Court review following the October 10 ruling on the initial petitions for rehearing had not yet expired. IRI has made no allegation that any detriment was suffered through reliance on the initial issuance of the mandate during the three weeks before it was recalled. By paying the amount originally found due into the Court registry, IRI was relieved of any further obligation to pay legal interest on those sums.

IRI nevertheless complains that, as a result of the Fifth Circuit's direction that the mandate herein issue forthwith, "petitioner was not heard and, therefore, had no day in court." Petition at 10. To assess the weight that should be given to that contention, this Court should note that:

- IRI had a very lengthy trial on the credit issue, as noted by the district court in its opinion: "The principal issue between the parties during the entire period of trial from the middle of Septem-

ber 1986 until the Friday before Christmas of that year was the methodology to be used in the determination of earnings damages as provided in the policy . . . ." Petition Appendix at 27(a).

- After the district court rendered its judgment, IRI moved to alter or amend the judgment or, alternatively, for a new trial, and thoroughly briefed the credit issue in connection with that motion. The district court denied the motion on January 23, 1990.

- At the appellate level, more than 16 pages of IRI's 27-page Argument in its original brief were devoted to the credit issue. The credit issue was the focus of IRI's oral argument, and IRI's reply brief —the last word before the appeals court panel— was dedicated almost exclusively to the credit issue.

- As noted in the Statement of the Case, *supra*, the arguments contained in IRI's pending petition for writ of certiorari were presented, in a virtually *verbatim* fashion, to both the Fifth Circuit and to Justice Antonin Scalia in his capacity as Circuit Justice for the Fifth Circuit before being advanced yet again in the pending petition.

This is not the track record of a litigant that has not been heard.

It is instructive, in this connection, to look at the kinds of cases in which a court of appeals issues its mandate "forthwith," as the Fifth Circuit did here. A court may order immediate issuance of the mandate when it is "satisfied (1) that [the] court would not change its decision upon rehearing, much less hear the case en banc, and (2) that there is no reasonable likelihood that the Supreme Court would grant review." *Ostrer*, *supra* at 598.

After nine years of litigation and appeals, a unanimous Fifth Circuit panel plainly concluded that this case came well within the *Ostrer* standards, and therefore ordered its mandate to issue forthwith. The record fully supports

this conclusion. There is nothing here that warrants the exercise of the supervisory powers of the United States Supreme Court.

III. THE PETITION MISSTATES THE ISSUES THAT WOULD PROPERLY BE BEFORE THE COURT IF CERTIORARI WERE GRANTED.

At the close of its Petition, IRI asks for "summary reversal" in this case. Petition at 12. That request for relief does not comport with the questions IRI has presented for review, nor does it comport with the arguments IRI has advanced to justify review of those questions. The nub of IRI's complaint before this Court is that the Fifth Circuit did not explain the recall of its mandate, so IRI had no opportunity to be heard on the propriety of the recall. IRI maintains "the issues are procedural only" (Petition at 2), and Cotton agrees. The appropriate relief to be sought in these circumstances is a remand to the circuit court, for further proceedings consistent with this Court's instructions. IRI's request for a reversal of the Fifth Circuit's opinion, instead of a remand, raises questions about the proper scope of the Court's review of the judgment below, and the sufficiency of the record before the Court to entertain a remedy which goes to the merits of the case. Cotton is obliged to point these questions out to the Court now, pursuant to the pertinent provisions of Supreme Court Rule 15.1:

> In addition to other arguments for denying the petition, the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstate-

> ments *in the brief in opposition* and not later. (Emphasis in original).

Even IRI is prepared to admit that the Fifth Circuit's current opinion, as amended after recall of the mandate, represents that court's view of what constitutes the just outcome on the merits in this case: "presumably the spontaneous recall of mandate was based on the Court's belief that it may have erred and that the error may have created an injustice." Petition at 5. But in seeking reversal instead of remand as a remedy, IRI is apparently asking this Court to reinstate a prior holding on the merits—a holding since rejected by the appellate court—without even the benefit of briefing on the merits, let alone a review of the record itself.[3] This is an anomalous request from a party invoking the old adage, "justice must satisfy the appearance of justice" (Petition at 10), as support for its writ petition. Indeed it is more than that: it is a confession that the IRI petition does not seek justice or due process, but only a result to IRI's liking. What IRI realizes it can never achieve on the merits, IRI hopes to achieve by challenging the discretionary procedural steps taken by the court of appeals, in a matter of weeks, to correct a mistake.

Supreme Court Rule 14.1 clearly provides that: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." But the relief requested by IRI goes beyond the scope of the questions

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[3] As a matter of substantive law, the Fifth Circuit's action in revising its prior holding was clearly correct. The original opinion completely ignored the well-established principle that the normal business interruption policy (such as the one in this case) affords the insured two separate and distinct types of coverage: one for actual business interruption losses and one for expenses incurred to reduce loss. A leading text in the field notes, with respect to the latter coverage, that "[a]lthough incorporated into the form itself, this provision really represents a supplementary contract." R. MORRISON, A. MILLER & S. PARIS, BUSINESS INTERRUPTION INSURANCE: ITS THEORY AND PRACTICE 102 (1986).

set forth for review in the Petition. The Petition should therefore be denied, because the briefs and record before the Court do not support consideration of the remedy sought by Petitioner.

CONCLUSION

This matter has absolutely none of the attributes that might qualify a case for certiorari. It is to be hoped, however, that one aspect of the instant petition still sets it apart from the others this Court receives, and that is its effrontery in suggesting the entire Fifth Circuit is subject to "outside influences" (Petition at 10) that lead to "lawless behavior" (Petition at 12).

Such remarks are made to attract attention, but they ought not be rewarded with it. They violate the spirit if not the letter of Supreme Court Rule 24.6; on this ground alone, IRI's petition deserves to be disregarded.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

90-4128

COTTON BROS. BAKING CO., INC.,
Plaintiff-Appellee,
versus
INDUSTRIAL RISK INSURERS,
Defendant-Appellant,

Appeal from the United States District Court
for the Western District of Louisiana

APPELLANT INDUSTRIAL RISK INSURERS' MOTION TO RECALL MANDATE

Industrial Risk Insurers (IRI) respectfully moves that this Court recall the mandate issued January 6, 1992 in the above-captioned case.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The substantive case involves the District Court's ruling that payments, prior to trial of the case, to an insured under a business interruption loss policy, need not be credited to the insurer. On appeal, this Court reversed on September 13, 1991, holding that failure to credit the payments would result in a double recovery by the insured. *Cotton Brothers Baking Co., Inc. v. IRI*, 941 F.2d 380 (5th Cir. 1991). (Attached hereto as Exhibit B.) Both parties filed petitions for rehearing, the insured's substantive, the insurer's pointing out technical mathe-

matical errors. Both were denied October 10, 1991, although technical changes were made in the original opinion. *Id.* (Attached hereto as Exhibit C.) The mandate issued November 4, 1991.

On November 25, 1991, the Court issued an order *sua sponte* recalling its November 4 mandate "pending further consideration of this case before this Court." (Attached hereto as Exhibit D.) The Court then, on January 6, 1992, issued a "Substituted Opinion on Rehearing" reviving Cotton Bros.' dead petition for rehearing and *pro tanto* reversing the previous opinions. The opinion ordered that the "mandate shall issue forthwith." *Cotton Brothers v. IRI*, —— F.2d — —(5th Cir. 1992) (Available on Westlaw at 1992 WL 738). (Attached hereto as Exhibit E.)

STATEMENT IN SUPPORT OF MOTION TO RECALL MANDATE

The procedural occurrences in this case from October 10, 1991 through January 6, 1992 are unprecedented. IRI's research discloses no case prior to the instant case where a federal court has recalled a mandate after petitions for rehearing raising the same issues were denied. The purpose of this motion to recall mandate is to revest this Court with jurisdiction so that the attached Petition for Rehearing and Suggestion for Rehearing En Banc may be filed questioning the unprecedented departure from normal procedures. (Attached hereto as Exhibit A.)

For reasons stated more fully in Exhibit A, a mandate may be recalled only in extraordinary circumstances for good cause to prevent an injustice. Local R. 41.2; *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971). Those stringent criteria are met in the instant case. (1) Circumstances are not merely extraordinary; they are unprecedented. IRI's research discloses no other case in any Circuit where a court recalled a mandate and subsequently reversed itself adopting the position of a petition for rehearing previously denied. Added to that are

two additional unprecedented factors. The Court revived a dead petition for rehearing and never requested a response to it as contemplated by Fed. R. App. P. 40(a), and nowhere did the Court offer a word in explanation for its actions. (2) There is good cause for recall. The Court ordered the mandate to issue forthwith thereby precluding the orderly process of simply filing a Petition for Rehearing. Had the Court stayed the mandate for the normal 21 days, this extraordinary motion would have been unnecessary. (3) The recall will prevent an injustice. For reasons stated far more fully in the exhibits the cumulative effect of the unprecedented actions between October 10, 1991 and January 6, 1992 violated the norms of procedural regularity inherent in due process of law and brought the "integrity of its own process," *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988), into question thereby raising questions about the fair and orderly administration of justice within this Circuit.

For the above reasons, as elaborated on in Exhibit A, the mandate should be recalled.

Dated this 5th day of February, 1992.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

90-4128

COTTON BROS. BAKING CO., INC.,
Plaintiff-Appellee,

versus

INDUSTRIAL RISK INSURERS,
Defendant-Appellant,

Appeal from the United States District Court
for the Western District of Louisiana

APPELLANT INDUSTRIAL RISK INSURERS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

STATEMENT OF THE ISSUES

The issues all grow out of the procedural posture of the instant case following denial of the petitions for rehearing and issuance of the mandate: *e.g.*, (1) *sua sponte* recall of the mandate; (2) the failure to request a response from IRI to the petition for rehearing filed (and denied) by Cotton Bros. when (3) the Court was to adopt Cotton Bros.' previously denied petition for rehearing, and (4) not providing any reasons for any of the above.

1. May a court order *sua sponte* recall of the mandate to change its own final decision because the Court concludes it was wrong?

2. Do the principles of due process inherent in Fed. R. App. P. 40(a) allow a court to dispense with a response

to a previously denied petition for rehearing prior to granting it in circumstances where the grant is not based on an intervening judicial decision?

3. Must a court provide an explanation for recall of mandate and subsequent reversal of judgment?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The substantive case involves the District Court's ruling that payments, prior to trial of the case, to an insured under a business interruption loss policy, need not be credited to the insurer. On appeal, this Court reversed on September 13, 1991, holding that failure to credit the payments would result in a double recovery by the insured. *Cotton Brothers Baking Co., Inc. v. IRI*, 941 F.2d 380 (5th Cir. 1991). Both parties filed petitions for rehearing, the insured's substantive, the insurer's pointing out technical mathematical errors. Both were denied October 10, 1991, although technical changes were made in the original opinion.[1] *Id.* The mandate issued November 4, 1991.

On November 25, 1991, 46 days after denial of the petitions for rehearing, the Court issued an order *sua sponte* recalling its November 4 mandate "pending further consideration of this case before this Court."[2] The Court then, on January 6, 1992, issued a "Substituted

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[1] The case, both at trial and on appeal, involved a third party, Baker Perkins, Inc., an industrial baking supplier who contracted to install replacement equipment after the fire that caused the business interruption. There were delays which both parties attributed to the other. At trial, Cotton Bros. obtained a judgment against Baker Perkins which was affirmed in part and reversed in part on appeal. Petitions for rehearing were denied along with the others on October 10, 1991.

[2] When counsel for the parties called the Clerk of the Court to ask for information, they were told not to file any papers unless requested to do so. There was no request.

Opinion on Rehearing" reviving Cotton Bros.' dead petition for rehearing and *pro tanto* reversing the previous opinions.[3] *Cotton Brothers v. IRI*, —— F.2d —— (5th Cir. 1992) (Available on Westlaw at 1992 WL 738). The January 6 opinion ordered that the "mandate shall issue forthwith."

ARGUMENT AND AUTHORITIES

The handling of this case presents this Court with important and serious questions relating to the fair and orderly administration of justice within this Circuit as well as disregard for the applicable law of the Circuit. The January 6 "Substituted Opinion on Rehearing," although described as merely a revision and correction of the September 13 opinion granted all the relief Cotton Bros. requested in its petition for rehearing with a resulting five-fold increase in IRI's liability to Cotton Bros. In the opinions of September 13 and October 10, the Court ruled that the "failure to credit IRI for its prior payments would result in a double recovery by Cotton Bros." 941 F.2d at 385. The opinion of January 6 reversed that conclusion, finding that the "record is devoid of acceptable evidence showing IRI made any payments whatever for business interruption losses." 1992 WL at 740. In making that determination, the Court became the first federal court to recall a mandate and reverse a judgment after denial of a petition for rehearing raising the same issues. To do so, the Court had to revive a dead petition for rehearing to which there had been neither a need, nor a call, to respond by IRI, the then-prevailing party. That, too, is unprecedented.

The Court changed its mind on the double recovery issue, but offered no explanation for its course of conduct: (1) There was no statement of the reasons for the recall of the mandate *sue sponte*. (2) There was no mention

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[3] The judgment against Baker Perkins was unaffected as was a judgment for $324,735 against IRI on a separate fire loss policy.

of Fifth Circuit Local Rule 41.2: "A mandate once issued shall not be recalled except to prevent injustice." (3) There was no statement why IRI—which was to lose—was not allowed a chance to respond as contemplated by Fed. R. App. P. 40(a). (4) Nor was there a word offered as to why a decision on the merits that was correct on September 13, correct on October 10, final on November 4, was questionable November 25, and wrong on January 6.

What the Court did is without precedent. Courts do not recall mandates without any external stimulation simply because the judges subsequently come to the conclusion that they erred. To do so would undermine the concept of finality. The problem is not a new one; courts have spoken forcefully to the need for finality even in the face of an erroneous judgment. As Justice Harlan stated: "I can think of nothing more unsettling to lawyers and litigents, and more disturbing to their confidence in the even-handedness of the Court's processes, than to be left in . . . uncertainty . . . as to when their cases may be considered finally closed in this Court." *United States v. Ohio Power Co.*, 353 U.S. 98, 111 (1957) (dissenting opinion). There is *no* dissent from the proposition that a final judgment once issued remains final except in extraordinarily limited circumstances—and those circumstances specifically exclude change of mind by the judges. *See, e.g., Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965) ("If [the Court] were in error . . . it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari"); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973) ("Alleged erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment not void when issued"); *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 715 (9th Cir. 1982), (citing 16 C. Wright, A. Miller, E. Cooper and E. Gressman, *Federal Practice and Procedure* § 3938 at 284-85 (1977) [hereinafter Wright & Miller]) ("a conviction

that the court erred [is] ordinarily not alone sufficient grounds for recall of mandate after final judgment") *vacated on other grounds*, 459 U.S. 1095 (1983). IRI's research discloses no prior case wherein a federal court has recalled a mandate and then granted a petition for rehearing that previously had been denied.

Every Circuit has spoken to the issue of recall of mandate. "All of the courts of appeals emphasized that recall of a mandate is an extraordinary remedy, to be used sparingly.' *American Iron & Steel Institute v. EPA*, 560 F.2d 589, 594 (9th Cir. 1977); Wright & Miller § 3938 at 279. *Legate* expresses the rationale succinctly: "There must be an end to dispute." 348 F.2d at 166.

Because the power to recall is "part of the court's power to protect the integrity of its own process," *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988), it must be used consistently with the court's own processes. Only when extraordinary circumstances creating an obvious injustice occur is a departure from normal procedures even thinkable. When there are compelling reasons for a departure from the routine, when the changes are more than merely clerical, it is incumbent on the court to articulate clearly the basis for its departure. The principles inherent in due process of law demand no less, for justice must not only be done, it must also appear to be done.

Cotton Bros. would have had no basis to file a motion for recall of the mandate. Had Cotton Bros. done so, the motion would have been denied out of hand since none of the basic prerequisites for granting the motion could be shown to exist. By acting *sua sponte*, the Court gave to Cotton Bros. a remedy that even it would not have sought. Recall of a mandate, while allowable, is only done under extraordinary circumstances for good cause and to prevent injustice. Litigants are entitled to rely on the salutary principle that a legal contraversy has a known ending; courts need to clear dockets and decide new claims.

American Iron & Steel Institute, 560 F.2d at 592. Only in exceptional circumstances "should the doctrine of repose admit of disturbance to settled litigation." *Dilley v. Alexander*, 627 F.2d 407, 410 (D.C. Cir. 1980). The parties understood the meaning of finality. They had agreed upon the amount necessary to satisfy the judgment, and twenty-one days after the petitions for rehearing were denied IRI deposited that agreed amount into the Registry of Court.

Judge Leventhal's *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971) provides an "exhaustive and scholarly" analysis of recall of mandate decisions. *Wright & Miller* § 3938 at 288. Judge Leventhal's list of exceptions to the general rule of repose begins with the obvious need to correct clerical mistakes. Beyond that, the examples he found for extraordinary circumstances to prevent an injustice were (1) fraud on the court,[4] (2) avoiding different results in similar cases pending at the same time,[5] (3) the need to revise unintended instructions to the trial court which would produce an unjust result, and (4) a catch-all "other" category based on reasons that would support an independent suit at the trial court.

The federal courts authorize recall [6] to correct unanticipated and unintended consequences to a party, to allow an award for interest from the day of first judgment,[7]

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[4] *See, e.g., Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631 (5th Cir. 1971).

[5] As illustrated by *Gradsky v. United States*, 376 F.2d 993 (5th Cir. 1967), where this Court recalled a mandate to give some defendants the benefit of a Supreme Court remand obtained by their co-conspirators.

[6] Note, *Recall of Appellate Mandates in Federal Civil Litigation*, 64 Cornell L. Rev. 704 (1979).

[7] There are nine such cases in this Circuit, the most recent being *Masinter v. Tenneco Oil Co.*, 934 F.2d 67 (5th Cir. 1991).

to provide equal justice for those similarly situated,[8] to allow a criminal defendant an opportunity to petition for certiorari,[9] and to prevent fraud on the court. Judge Leventhal had no example of a court changing its mind. To the contrary, *Legate v. Maloney* had specifically denied the appropriateness of action under that circumstance and Judge Leventhal agreed. Thus he looked to the "special reason, 'exceptional circumstances,' in order to override the strong policy of repose, that there be an end to litigation." 348 F.2d. at 278 (*quoting Hines v. Royal Indemnity*, 253 F.2d 111, 114 (6th Cir. 1958). *See also*, *Iverson v. IRS*, 257 F.2d 408 (8th Cir. 1958). A good example would be *Zipfel* where an intervening Supreme Court decision departed in a "pivotal" aspect from the original circuit opinion. 861 F.2d at 567.

What occurred in the instant case is no correction of a clerical error, no erasing of an unintended instruction and there is no second or intervening case. The September 13 opinion ruled on the merits that IRI's payments to Cotton Bros. under the insurance policy should be credited to IRI in determining the amount of business interruption loss. Cottton Bros. then devoted nine and a half pages of its petition for rehearing to arguing that the recovery of both extra expenses and earnings loss is not a prohibited double recovery. Cotton Bros.' position was rejected in the denial of rehearing on October 10. Thereafter, Cotton Bros. made no effort to seek reconsideration of the Court's denial of the peti-

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[8] Wright & Miller note the clash of strong federal policies that diversity cases be decided similarly and appreciation of the values of repose. "The obvious present stopping point would be a requirement that relief is available only if different results have been reached in cases growing out of a single historic setting." § 3938 at 287. Fully implicit in that analysis is that simple correction of a mistaken opinion is not a justifiable reason for reopening a closed case.

[9] *E.g., Smith v. Blackmon*, 677 F.2d 20 (5th Cir. 1982); *Ordonez v. United States*, 588 F.2d 488 (5th Cir. 1978).

tion for rehearing. Yet, 46 days after rejecting Cotton Bros.' position on the double recovery issue (for a second time), the Court, on its own motion, and without explanation, decided to look at the issue for a third time. It then adopted Cotton Bros.' position in the "revised and corrected" January 6 opinion.[10] The Court changed its mind!

IRI's research discloses: (1) This Court has never recalled a mandate simply because judges changed their minds about the proper outcome. (2) This Court has never recalled a mandate after denying petitions for rehearing or suggestion for rehearing en banc where the same substantive issue was involved. (3) There are no cases in this Circuit where the Court recalled its mandate and issued a substituted opinion reaching an entirely different result.[11] (4) Finally, research of all Circuits discloses no case where a Court recalled a mandate after petitions for rehearing or suggestions for rehearing en banc raising the same issues were denied. The instant case stands nakedly alone.

To second-guess is human. To undo a presumed error during the appropriate period is laudable. But to undo a final judgment without extraordinary circumstances (or explanation) brings the integrity of the process into question.

It does not matter if judges subsequently conclude they erred; once a judgment is final, the mandate may not be recalled for that reason. More justification is required but, in the instant case, there is no more. The Court offered none in its "Substituted Opinion on Re-

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[10] The January 6 opinion left unaffected the judgment against Baker Perkins. It also let stand the $324,735 judgment against IRI under the fire loss policy. The revision and correction was on the double recovery issue, a reversal that resulted in a five-fold increase in IRI's liability to Cotton Bros.

[11] See note 10 *supra*.

hearing" and Cotton Bros. quite obviously had nothing to that effect in its petition for rehearing (because the law does not require showing extraordinary circumstances in a petition for rehearing). The lack of justification for upsetting a final judgment was only the first error committed by the Court. The failure to obtain a response to the previously denied, but now apparently revived, petition for rehearing was the second. The third and topping error came when the Court offered no explanation for any of its actions.

Although Fed. R. App. P. 40(a) does not facially require a response to a petition for rehearing prior to a grant thereof, the use of "ordinarily" means that it will be the exceptional situation when one is not requested. "If the court finds any possible merit in the petition, the court will direct its clerk to request that the prevailing party file an answer within a specified time." *Wright & Miller* § 3986 at 473. Robert L. Stern explains that the rules forbidding the filing of a reply without a request from the court protect the prevailing counsel (who otherwise would feel the necessity of replying). While courts may proceed on their own without responses when the granting of a rehearing rests "on considerations with which the Court is fully familiar and can evaluate for itself . . . they are not likely to do so in other circumstances when a response would be helpful to the court as well as to the respondent." Appellate Practice in the United States 463 (1989). The parties are most familiar with their record, and as Judge Timbers wrote: "Cutting off appellee's right to respond not only is grossly unfair to the appellees and their counsel; it deprives the Court of what may very well be critical information which may cast serious doubt on the propriety of granting" the petition for rehearing. *Davis v. Smith*, 607 F.2d 535, 541 (2d Cir. 1978) (dissenting).

United States v. Allegheny-Ludlum Industries, Inc., 568 F.2d 1073 (5th Cir. 1978), illustrates the limited cir-

cumstances when it is appropriate to go forward without requesting a response. Because an intervening Supreme Court decision "squarely and unequivocally determines the issue" in the case, "we see no occasion to request a response to the petition for rehearing." *Id.* at 1074. This Circuit's construction of "ordinarily"—that a response may be dispensed with only when nothing could be offered—is consistent with what both Wright & Miller and Stern find to be the appellate practice of the United States. Only in the most extraordinary and limited circumstances may a response be dispensed with prior to granting a petition for rehearing.

In the instant case, the failure to call for a response aggravates and is aggravated by the Court's omission of any reasoning for (1) the *sua sponte* recall or (2) its change of mind. Often opinions will select one of two available theories without providing an elaboration of why one was selected over the other. While this is not to be encouraged, it is a necessary part of the judicial process and it even occurs at the time of filing some substituted opinions on rehearing. But once a decision becomes final, it cannot be unsettled without reason. Implicit in both due process of law and the fair and impartial administration of justice is that when a change occurs to upset finality, there must be an explanation of the reasons for the change. What might have been "enough" at the initial or rehearing stage is no longer sufficient when a final judgment is to be overturned. This is basic and, indeed, implicit in the recall of mandate decisions discussed earlier. Judge Leventhal could summarize the area because courts knew that they were obligated to explain a change in a final determination.

This is, of course, precisely the obligation that courts and Congress have imposed on administrative agencies. Whatever the freedom to make an initial choice of policy, a change of policy must be explained and justified. As the Supreme Court stated in *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S.

29, 56 (1983), "while the agency is entitled to change its view . . . it is obligated to explain its reasons for doing so." To fail to explain renders the decision arbitrary and capricious. Although there may be a higher requirement of explanation imposed on agencies than courts, decisions undoing final determinations and short-circuiting routine procedures are arbitrary and capricious unless they are explained.

Once explanation becomes necessary, as here, hearing both sides becomes mandatory as well. There can be no reasoned explanation if the decision-maker is unaware of the relevant arguments a party would present.

The instant case, so far as IRI's research discloses, stands alone in recalling a mandate for reasons provided by the petition for rehearing formerly considered and rejected. Yet to say merely that it is wrong fails to capture the totality of the circumstances, which the *sua sponte* action, the failure to request a response as Fed. R. App. P. 40(a) contemplates and the issuing of the mandate forthwith rather than providing time for the sure-to-follow motions from IRI.

From the January 6 opinion, it is impossible to tell if the Court intended to depart so completely from this Circuit's norms of procedural regularity. It is unascertainable if the Court understood that it takes exceptional circumstances to recall a mandate and that a response to a petition for rehearing is all but mandatory if there is anything a respondent could say that might affect the judgment. All that is ascertainable is that the only thing "exceptional" about this case is the procedural anomalies, none of which reflects favorably on the administration of justice.[12] At stake, in *Zipfel's* words, is the "integrity of

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[12] It is also ascertainable that the District Judge, The Honorable Nauman S. Scott, sat by designation with the Fifth Circuit on November 4-7, 1991, between the issuance of the mandate on November 4 and its *sua sponte* recall on November 25. IRI is not accusing Judge Scott or any other judge of any impropriety. IRI does not know if Judge Scott ever talked with any member of the Fifth Circuit panel about its original opinion, and even if he did,

[the Court's] own process." 861 F.2d at 567. It seems clear that no one gave any thought to the cumulative effect of the decision-making between October 10, 1991 and January 6, 1992. As a result, it crossed over the line between legal error and lawless behavior and thereby violated the Due Process Clause of the Fifth Amendment.

CONCLUSION

For the above reasons, the Suggestion for a Rehearing En Banc should be granted and the Court should reinstate the opinion and judgment contained in the mandate that issued November 4, 1991.

Dated this 5th day of February, 1992.

Respectfully submitted,

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there is obviously nothing improper with a District Judge discussing his former case with Circuit Judges after their final decision in the matter. But a reasonable person, who is uninformed about the internal workings of the court, might believe that the *sua sponte* recall of the mandate and then reversal of the decision was the result of improper judicial lobbying. It is essential to public confidence in the fairness and impartiality of the judicial system that the appearance of injustice never intrude into decision making.

IN THE SUPREME COURT
OF THE UNITED STATES

No. 562

COTTON BROTHERS BAKING COMPANY, INC.,
Plaintiff,

v.

INDUSTRIAL RISK INSURERS,
Defendant/Petitioner.

APPLICATION TO STAY ENFORCEMENT PENDING DECISION ON A TIMELY FILED PETITION FOR CERTIORARI

TO: THE HONORABLE ANTONIN SCALIA, CIRCUIT JUSTICE FOR THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Industrial Risk Insurers[1] (IRI), seeks a stay of enforcement pending decision on a petition for certiorari to prevent from becoming practically irreversible a judgment resulting from a proceeding in the Court of Appeals that "has so far departed from the accepted and usual course of judicial proceedings," S. Ct. R. 10, that it is literally without precedent. The unique procedure below so clearly conflicts with the Federal Rules of Appellate Procedure, and so apparently denies IRI the most fundamental guarantee of Due Process, that this Court should intervene to restore the substance and appearance of justice.

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[1] See attached Exhibit A for a list of companies who are responsible on the policy in question.

A simple chronology of events makes the procedural defects below self-evident:

- *July 31, 1989*: the District Court, following trial to the Court, enters judgment against IRI and in favor of Cotton Brothers Baking Company, Inc. (Cotton Bros.) for $4,396,000 plus interest.

- *September 13, 1991*: the Fifth Circuit enters an opinion that reduces the judgment to $810,000 plus interest because the District Court's failure to credit IRI for payments made prior to trial "would result in a double recovery." 941 F.2d 380, 385 (5th Cir. 1991). (Attached hereto as Exhibit B.)

- *October 10, 1991*: the Fifth Circuit panel denies petitions for rehearing from both sides, although it does make some minor technical corrections in its opinion. (Attached hereto as Exhibit C.)

- *November 4, 1991*: the Fifth Circuit's mandate issues.

- *November 4-7, 1991*: the trial judge sits by designation with the Fifth Circuit.

- *November 4, 1991*: IRI deposits into the Registry of Court the amount the parties agreed was necessary to satisfy the judgment.

- *November 25, 1991*: the Fifth Circuit panel *sua sponte* recalls its mandate "pending further consideration of this case before this Court." (Attached hereto as Exhibit D.)

- *January 6, 1992*: without ever having allowed IRI to respond to Cotton Bros.' petition for rehearing, the Fifth Circuit "revises and corrects" its opinion to affirm the entire original judgment against IRI. (Attached hereto as Exhibit E.)

- *January 6, 1992*: the panel orders that the mandate issue forthwith.

REASONS FOR GRANTING THE STAY

A. *THE QUESTIONS ARE SUBSTANTIAL.*

The handling of this case presents this Court with important and serious questions relating to the fair and orderly administration of justice by the federal courts. IRI will present this Court with issues relating to: (1) the limits on the inherent power of an appellate court to unsettle its own final judgment; (2) the propriety of granting a substantive motion for rehearing under Fed. R. App. P. 40(a) without giving the opposing party an opportunity to respond; and (3) the appearance of propriety and the integrity of the appellate process.

1. By Recalling Its Mandate *Sua Sponte*, the Fifth Circuit Disregarded the Finality Doctrine.

The January 6 "Substituted Opinion on Rehearing," although described as merely a revision and correction of the September 13 opinion, granted the relief Cotton Bros. requested in its petition for rehearing. In the opinions of September 13 and October 10, the Court ruled that the "failure to credit IRI for its prior payments would result in a double recovery by Cotton Bros." 941 F.2d at 385. The opinion of January 6 reversed that conclusion.

What the court did is without precedent. Courts do not recall mandates simply because the judges subsequently come to the conclusion that they erred. To do so would undermine the concept of finality. The problem is not a new one; courts have spoken forcefully to the need for finality even in the face of an erroneous judgment. As Justice Harlan stated: "I can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the evenhandedness of the Court's processes, than to be left in . . . uncertainty . . . as to when their cases may be considered finally closed in this Court." *United States v. Ohio Power Co.*, 353 U.S. 98, 111 (1957) (dissenting opinion).

There is *no* dissent from the proposition that a final judgment remains final except in limited extraordinarily circumstances—and those circumstances specifically exclude change of mind by the judges. *See, e.g., Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965) ("If [the Court] were in error . . . it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari"); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973) ("Alleged erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment not void when issued"); *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 715 (9th Cir. 1982) (citing 16 C. Wright, A. Miller, E. Cooper and E. Gressman, *Federal Practice and Procedure* § 3938 at 284-85 (1977) [hereinafter Wright & Miller]) ("a conviction that the court erred [is] ordinarily not alone sufficient grounds for recall of mandate after final judgment"), *vacated on other grounds*, 459 U.S. 1095 (1983). IRI's research discloses no prior case wherein a federal court has recalled a mandate and then granted a petition for rehearing that it had previously denied.

Every Circuit has spoken to the issue of recall of mandate. "All of the courts of appeals emphasized that recall of a mandate is an extraordinary remedy, one to be used sparingly." *American Iron & Steel Institute v. EPA*, 560 F.2d 589, 594 (9th Cir. 1977); Wright & Miller § 3938 at 279. *Legate* expresses the rationale succinctly: "There must be an end to dispute." 348 F.2d at 166.

Litigants are entitled to rely on the salutary principle that a legal controversy has a known ending; courts need to clear dockets and decide new claims. *American Iron & Steel Institute*, 560 F.2d at 592. Only in exceptional circumstances "should the doctrine of repose admit of disturbance to settled litigation." *Dilley v. Alexander*, 627 F.2d 407, 410 (D.C. Cir. 1980). The parties understood

the meaning of finality. They had agreed upon the amount necessary to satisfy the judgment, and twenty-one days after the petitions for rehearing were denied, IRI deposited that agreed amount into the Registry of Court.

Greater Boston Television Corp. v. FCC, 463 F.2d 268 (D.C. Cir. 1971) (Leventhal, J.), *cert. denied*, 406 U.S. 950 (1972), provides an "exhaustive and scholarly" analysis of recall of mandate decisions. *Wright & Miller* § 3938 at 288. *Greater Boston's* list of exceptions to the general rule of repose begins with the obvious need to correct clerical mistakes. Beyond that, the extraordinary circumstances sufficient to justify recalling a mandate are limited to: (1) fraud on the court, (2) avoiding different results in similar cases pending at the same time, (3) the need to revise unintended instructions to the trial court which would produce an unjust result, and (4) a catch-all "other" category based on reasons that would support an independent suit at the trial court.

What occurred here fits none of the recognized grounds for recall of a mandate. The September 13 opinion ruled on the merits that IRI's payments to Cotton Bros. under the insurance policy should be credited to IRI to avoid a double recovery. Cotton Bros. then devoted nine and a half pages of its petition for rehearing to arguing against this holding. The Fifth Circuit rejected Cotton Bros.' position by denying rehearing on October 10. The parties acted in reliance. Mandate issued. The Court changed its mind in the "revised and corrected" January 6, opinion. No word was offered as to why a decision on the merits that was correct on September 13, correct on October 10, and *final* on November 4, was questionable on November 25 and wrong on January 6.

2. The Procedure Followed Below Conflicts with Fed. R. App. P. 40(a).

Rule 40(a) provides that "[n]o answer to a petition for rehearing will be received unless requested by the

court, ..." As the Advisory Committee on Appellate Rules explained, this provision was "included to save time and expense to the party victorious on appeal." Federal Civil Justice Procedure and Rules 424 (West 1991 rev. ed.). Petitions for rehearing are so rarely granted that the rulemakers did not want to burden the victors with the need to respond unless there was some reason to do so. Wright & Miller § 3986 at 473.

Rule 40(a) specifically provides, however, that "a petition for rehearing will ordinarily not be granted in the absence of" a request for a response. Except for those extraordinary situations when nothing convincing can possibly be said in response, such as a directly controlling intervening decision of this Court,[2] the courts of appeals typically call for a response "[i]f the court finds any possible merit in the petition . . . ." Wright & Miller § 3986 at 473.

No extraordinary circumstance explains the appellate panel's deviation from standard procedure in this case. The only unusual aspect of this case is the fact that the Court of Appeals found no merit in the petition filed by Cotton Bros. until six weeks after it had denied that petition. That fact certainly cannot suggest that a response would have been futile.

In short, there is no excuse and no justification for the Court's failure to accord IRI the most basic element of due process, the right to respond before judgment was entered against it. To preserve the integrity of the federal appellate process, this Court should hold that Rule 40(a) guaranteed IRI that fundamental right.

3. The Procedural Irregularities Compromise the Appearance of Propriety and Integrity of the Appellate System.

The instant case stands alone in recalling a mandate for reasons provided by a petition for rehearing formerly

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[2] *E.g., United States v. Allegheny-Ludlum Industries, Inc.*, 568 F.2d 1073, 1074 (5th Cir. 1978).

considered and rejected. Yet to say merely that it is wrong fails to capture the totality of the circumstances, which include the *sua sponte* action, the failure to request the response contemplated in Fed. R. App. P. 40(a) and the issuing of the mandate forthwith rather than providing time for the sure-to-follow motions from IRI. These significant and unexplained departures from appellate rules and procedures fly in the face of "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" *Levine v. United States*, 362 U.S. 610, 616 (1960) (*quoting Offut v. United States*, 348 U.S. 11, 14 (1954); *see also, Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 813, 825 (1986) (*quoting In re Murchison*, 349 U.S. 133, 146 (1955)).

Because the power to recall is "part of the court's power to protect the integrity of its own process," *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988), it must be used consistently with the court's own processes. Only when extraordinary circumstances creating an obvious injustice occur is a departure from normal procedures even thinkable. When there are compelling reasons for a departure from the routine, when the changes are more than merely clerical, it is incumbent on the court to articulate clearly the basis for its departure. The principles inherent in Due Process of Law demand no less, for justice must not only be done, it must also appear to be done.

Each of the Fifth Circuit's departures from the norm —its *sua sponte* recall of mandate without explanation, its failure to allow IRI to respond to the revived petition for rehearing and its rush return of the mandate—marks this as a truly extraordinary case. Yet the only thing "exceptional about this case is the procedural anomalies, none of which reflects favorably on the administration of justice.[3] Redress for these procedural improprieties rests

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[3] IRI is not accusing Judge Scott or any other judge of any impropriety. IRI does not know if Judge Scott ever talked with any

with this Court's "supervisory power over federal courts . . . to protect the integrity of the federal system." *Frazier v. Heebe*, 482 U.S. 641, 648, n.7 (1987). That exercise is necessary to reverse a course of decision-making that crossed over the line between legal error and lawless behavior and thereby violated the Due Process Clause of the Fifth Amendment.

B. *AN ORDER FROM THIS COURT MAINTAINING THE* STATUS QUO *IS NECESSARY TO PREVENT IRREPARABLE INJURY.*

The procedural posture of this case since the denial of rehearings on October 10, 1991 creates important issues: All the relief IRI seeks herein is to maintain the *status quo* pending decision on a petition for certiorari. If IRI should ultimately prevail, then any execution of the judgment will have been erroneous and harmful to IRI. Although it is unclear who will benefit from sums paid in satisfaction of the judgment,[4] what is certain is that any sum, once paid, may be irretrievable by IRI if its appellate remedies are granted. It is clear that none of the funds will remain with the named plaintiff Cotton Bros.

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member of the Fifth Circuit panel, and even if he did there is obviously nothing improper with a District Judge discussing his case with Circuit Judges after their final decision in the matter. But a person who knows only the publicly available facts might reasonably believe that the *sua sponte* recall of the mandate and subsequent reversal of the decision may have resulted from something Judge Scott said to the Court of Appeals, to which IRI was never allowed to respond. It is essential to public confidence in the fairness and impartiality of the judicial system that the appearance of injustice never intrude into decision making. The safest way to avoid an impression of unfairness is to adhere to procedural regularity.

[4] On January 24, 1992, R. Gene Cotton and others petitioned the District Court for permission to intervene on the grounds that petitioners are entitled to the sums paid by IRI in satisfaction of the judgment. On January 27, 1992, prior to IRI's receipt of the petition, Judge Scott issued an order granting the petition.

When Cotton Bros. was sold to American Bakeries Company in 1985, the purchase agreement specified that any proceeds of this litigation were to be shared between the shareholders of Cotton Bros. and American Bakeries. Adams T.L. Acquisition Corp. (Adams T.L.) is the successor to American Bakeries Company. Any sums paid to Adams T.L. are subject to a lien of the Federal Deposit Insurance Corporation. Any sums paid to Cotton Bros. will be disbursed to its shareholders. In either instance, satisfaction of the judgment will result in the payment of money which IRI may be unable to recover if IRI is successful. Therefore, a stay is necessary to prevent this irreparable harm.

Furthermore, absent relief from this Court, IRI faces an imediate loss in the form of execution fees in Connecticut, IRI's home state, where Cotton Bros. has now retained local counsel to seek recovery of the nearly seven million dollars outstanding on the award of January 6, 1992. Under Connecticut's post-judgment execution statutes,[5] Cotton Bros. can levy upon IRI's bank accounts and only thereafter provide IRI its first notice of execution. Conn. Gen. Stat. §§ 52-351a, 52-367a (1991). Moreover, Connecticut allows a sheriff's fee of ten percent (10%) of the amount collected. 1991 Conn. Pub. Acts 350 § 2 would generate a sheriff's fee of $700,000. There is no (effective Oct. 1, 1991). Thus, a seven million dollar levy statutory procedure in Connecticut providing for recoupment of a sheriff's fee if the executed judgment should subsequently be set aside. Thus, IRI might find itself victorious but out $700,000. All this can be avoided by the grant of a temporary stay of mandate until this Court disposes of the petition for certiorari. On February 3, 1992, the United States District Court for the District of Connecticut granted IRI a stay of enforcement of the judgment until February 5, 1992 at 10:00 a.m. to allow your Honor to consider this stay application.

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[5] The state practices and procedures governing execution of a judgment apply pursuant to Fed. R. Civ. P. 62(f), 69(a).

Because the January 6, 1992 opinion ordered the "mandate shall issue forthwith," jurisdiction reverted to the District Court. Therefore, to preserve the *status quo*, IRI sought a stay of execution of the judgment from the District Court. (Attached hereto as Exhibit F.) On January 16, 1992, that Court denied relief. (Attached hereto as Exhibit G.) IRI then sought from the Fifth Circuit either a writ of mandamus ordering the District Court to stay execution or, in the alternative, an order to stay enforcement of the mandate. (Attached hereto as Exhibit H.) On January 23, 1992, the Fifth Circuit denied the relief. (Attached hereto as Exhibit I.)

A request to this Court is the only remaining avenue for temporary relief. Because Cotton Bros. is actively seeking to enforce the judgment, the current motion to stay enforcement is necessary. Although framed in slightly different terms, the substantive relief sought in each request is identical: a stay to maintain the *status quo* pending the seeking of appellate relief. Consequently, IRI's application is properly before this Court because the same relief has been sought and denied by the District Court and the Fifth Circuit. If this Court grants the stay pending the outcome of the petition for writ of certiorari, IRI will deposit into the Registry of Court an amount satisfying the judgment in full that the interested parties may move to collect immediately should IRI's petition prove unsuccessful.

CONCLUSION

The Application to Stay Enforcement of the Judgment pending disposition of a timely petition for certiorari should be granted.

Dated this 3rd day of February, 1992.

Respectfully submitted,

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(3)

No. 91-1614

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INDUSTRIAL RISK INSURERS,
Petitioner,

v.

COTTON BROTHERS BAKING COMPANY, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

While agreeing with Petitioner that "the issues are procedural only" (Opp. at 10), Respondent argues first, that Industrial Risk Insurers (IRI) deserves to lose because the Fifth Circuit belatedly got the merits right (Opp. at 6-7, 11 n. 3) and, second, in any event, IRI has had more than enough process. (Opp. at 2, 8-9.) The former argument well reflects Respondent's view of procedural regularity: the end justifies the means. The latter is consistent with Respondent's effort to trivialize and regularize the actions of the Fifth Circuit.[1]

I. THE FIFTH CIRCUIT'S UNPRECEDENTED ACTIONS ARE NOT WITHIN THE CONTEMPLATION OF THE LAW OF ANY CIRCUIT

Respondent embraces the Fifth Circuit's change of decision after its *sua sponte* recall of the mandate (Opp. at 6-7, 11 n. 3), yet shies away from admitting what hap-

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[1] Thus, by the end of Respondent's Brief, they become "discretionary procedural steps." (Opp. at 11.)

pened. Thus, Respondent says the January 6 opinion simply "substituted new language on the credit issue" (Opp. at 2) when, in fact, the Fifth Circuit reversed the unanimous conclusion of its September 13 and October 10 opinions. Respondent's argument rests on two simple propositions: (1) courts do recall mandates, sometimes *sua sponte* (Opp. at 5-7) and (2) "courts have granted petitions for hearing without requesting a response." Opp. at 7.) Respondent also notes that no prior court has ever recalled a mandate to grant a previously denied petition for rehearing. (Opp. at 4-5.) While the latter is basic to Petitioner's proposition that the Fifth Circuit has gone beyond the law of all circuits, Respondent merges all the points to argue that every circuit would behave as the Fifth did if only given the chance.[2] Thus, Respondent would have this Court leave the ruling below untouched because, if given an opportunity, other circuits would (a) deny petitions for rehearing and issue the mandate; (b) *sua sponte* recall the mandate; (c) grant the previously denied petition for rehearing; (d) without calling for a response under Fed. R. App. P. 40(a); and (e) without any explanation for its change of position or procedural behavior.[3]

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[2] "[T]he applicable case law confirms that the action taken by the Fifth Circuit here is well within the discretionary power vested in an appellate court." (Opp. at 5.) "In fact, ample precedent exists for everything which happened in the court below." (Opp. at 7.)

[3] Respondent basically admits there is no plausible legitimate theory of why the court changed its mind. Thus, Cotton Bros. suggests that either miscommunication between judges or judges and clerks or "the glaring arithmetical errors in the first opinion, noticed immediately by both parties and corrected by the Court in a second opinion on October 10, 1991, may have caused the Court to realize something was amiss, and that it should take another look at the case." (Opp. at 6 n.1.) That hardly explains why the court did not correct its previous errors, then and there, or at least call for additional briefing by the parties. Nor does it explain why the October 10 corrected opinion was so wrong it had to be reversed on January

This is exactly the argument IRI anticipated in the Petition for Certiorari and this is why IRI stated: "There is always a first time and this was it which then becomes precedent for the second unless it is checked. The need to halt such behavior represents the compelling reason for exercise of this Court's supervisory powers to intervene." (Petition at 4.) These are not merely "discretionary procedural steps" (Opp. at 11); they are unprecedented in American law and rightly so—for cumulatively, they exceed *any* standard of inherent discretion because they violate due process.

II. THE DECISION BELOW CONFLICTS WITH FED. R. APP. P. 40 AND VIOLATES DUE PROCESS

Respondent also argues that IRI has used up its full allotment of due process over the years. (Opp. 2, 4, 8-9.) That, however, is not the issue. IRI does not contend it has lacked ample process in the proceedings through October 10; IRI's point is that it was denied due process under the Constitution and the Federal Rules of Appellate Procedure by what happened *after* October 10.[4]

Respondent's point is that IRI had its best shot and lost fair and square, first in the district court and ultimately at the Fifth Circuit. Thus, Respondent's conclusion: "This is not the track record of a litigant that has not been heard." (Opp. at 9, emphasis deleted.) Fully implicit in Respondent's argument is that IRI had nothing more to contribute and every court had fully considered its arguments. This, of course, is typical of arguments that treat the merits as controlling procedure and, thus, view due process as a procedural nicety to be waived in the interests of expeditious justice. Often, when someone reaches

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6 nor why, if "something was amiss," the court issued its mandate 24 days later. If counsel for the Respondent can offer no more plausible rationale, it is not difficult to imagine what IRI believes.

[4] It is hardly surprising that Respondent limits its Rule 40 argument to a lame footnote bolstered by the weakest sentence being prefaced with "clearly." (Opp. at 7 n.2.)

the conclusion that due process may be dispensed with in the greater interests of justice, relevant data is never considered.[5] So, too, here. The instant litigation is about the amount of insurance proceeds owed Cotton Bros. as a result of a fire. The appellate litigation has turned on the issue of double recovery despite the fact the trial judge noted "[T]he issue of what part of these payments [to Cotton Bros.], if any, should be considered earning damages . . . has not been addressed by the parties." (R.E. No. 3, p. 39, ¶ 30.) The trial judge flat out missed the reason the issue was never addressed. From the filing of its complaints, Cotton Bros. had judicially admitted that it had no right to recover any amount in excess of the reduction in its gross earnings:[6] "prior to trial IRI paid a total of $3,585,762 to Cotton Brothers under its business interruption policy and is therefore *entitled to credit* for those payments." (Cotton Bros. Proposed Findings of Fact and Conclusions of Law, D.E. No. 418, p. 20.) (emphasis supplied) Because judicial admissions "eliminate the need for evidence on the subject matter of the admission," *Ferguson v. Neighborhood Housing Services*, 780 F.2d 549, 550-51 (6th Cir. 1986), and are conclusively binding on the party offering them, *White v. Arco/Polymers, Inc.*, 720 F.2d 1391 (5th Cir. 1983), IRI had offered no evidence.

Nevertheless, once the trial judge adopted a theory which ignored the judicial admission, Cotton Bros. embraced it fully. From that time onward, IRI has argued that by the law of the Fifth Circuit, Cotton Bros. is conclusively bound by its admissions. the trial judge did not discuss the point in his ruling on IRI's Assignments of Error. And the Fifth Circuit's opinions of September 13 and October 10 did not discuss the point because they

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[5] Thus, we learn from A. Lewis, Gideon's Trumpet (1963) that Gideon was, in fact, innocent of the charges against him.

[6] The relevant portion of Cotton Bros.' Second Amended and Restated Complaint is reproduced as Appendix A hereto.

ruled on the double recovery issue by concluding the clear meaning of the policy language required IRI to prevail as a matter of law. (Appendix to the Petition for Certiorari at 9a, 13a.) Thus, any discussion of judicial admissions was unnecessary.

However, once a court considers ruling for Cotton Bros. on the double recovery issue, then discussion of the judicial admission point is mandatory. Yet, the January 6 opinion did not do so. Why not? The only plausible reason is that the court was so focused on the sole issue relied upon in Cotton Bros. Petition for Rehearing, it forgot there were other arguments.[7] That is why a response under Fed. R.App. 40(a) is so important. If the court had called for a response, IRI would have pointed out that there was an additional basis to support the court's September 13 opinion, *i.e.*, Cotton Bros.' judicial admissions *conclusively* resolved the double recovery issue.

Respondent is correct that IRI has been heard in this litigation. But on what became the dispositive issue after *sua sponte* recall of the mandate, IRI has not been heard: not one syllable in any court explains why Respondent's concession that IRI "is therefore entitled to credit for those payments" does not legally require that IRI *be* "entitled to credit for those payments."[8] A response, as required by the plain meaning of Rule 40(a)

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[7] As in their Opposition in this Court, Cotton Bros. did not mention the judicial admission issue in its Petition for Rehearng.

[8] In its discussion of the judicial admissions point at the Fifth Circuit, Cotton Bros. argued its statements were not binding because: "the credit discussions in Cotton Bros.' pleadings which are alleged to be judicial confessions, however, are no more than counsel's arguments concerning the award which could be made by the trial judge. Arguments of counsel cannot bind any court to fall into legal error." Cotton Bros. Brief at 32. Cotton Bros. did not mention its Proposed Findings of Fact and Conclusions of Law, D.E. No. 418, p. 20: "prior to trial IRI paid a total of $3,585,762 to Cotton Brothers under its business interruption policy and is therefore entitled to credit for those payments."

would have precluded the Fifth Circuit's January 6 change of mind. That, in its most elementary sense, is why due process of law cannot be cavalierly tossed aside as the Fifth Circuit did and Respondent wrongly asserts every other circuit would.[9]

CONCLUSION

The Petition for Certiorari should be granted and this case should either be set for argument on the questions presented or summarily reversed because once a mandate issues, a judgment entered is final.

Respectfully submitted,

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Dated this 12th day of May, 1992.

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[9] Respondent also notes and uses its appendices to bolster the point that after January 6, IRI has attempted to raise the issues presented in the Petition for Certiorari in various motions. Respondent's position is, therefore, that IRI has been heard on these issues. (Opp. 2-3, 9.) An application for discretionary relief which is summarily denied is not the substance of due process of law. Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970).

APPENDIX

COTTON BROS.' SECOND AMENDED AND RESTATED COMPLAINT

11.

To date, defendant has paid plaintiff a total of $3,078,372.00 pursuant to its obligations under its business interruption insurance policy number 31-815935 issued to plaintiff herein. *Plaintiff has accepted this sum in partial payment of the actual losses it has sustained which are covered by the terms of defendant's business interruption policy.* However, plaintiff has maintained and continues to maintain that its insured business interruption losses far exceed the sum tendered to it by defendant.

12.

Plaintiff has supported its claim for additional payments under the terms of defendant's business interruption policy with a series of proofs of loss, reports and substantiating data, to wit:

(a) On March 1, 1982, plaintiff presented defendant with documented proofs of loss supporting *minimum* insured losses of $4,407,480.83 for the period from the occurrence of the fire through May 8, 1982;

(b) On May 31, 1983, plaintiff presented revised and refined data to defendant supporting *minimum* insured losses of $4,949,951.00 for the period from the occurrence of the fire through May 8, 1982; and

(c) On March 31, 1986, plaintiff presented defendant with an additional report, employing different methodology, supporting *minimum* insured losses of $4,921,619.00 for the period from the fire through May 8, 1982.

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13.

Despite the foregoing, defendant has failed and refused, and still fails and refuses, to make any additional payments to plaintiff under the business interruption policy at issue herein. Plaintiff therefore avers that defendant's refusal to pay plaintiff at least the sum of $1,329,108.83 (*being the difference between the lowest calculation of plaintiff's minimum insured losses and the amount paid to it by defendant*) is arbitrary, capricious and without probable cause.

(D.E. Nos. 168-171, ¶¶ 11, 12, 13) (Emphasis supplied).